APR 27 1895
JAMES H. McKENNEY,
Clerk.

No. 991

Brief of Black for Resp't

U. S. Supreme Court.

Filed Apr. 27, 1895.

Brice Allan Miller et al.,
Libellants and Appellees,

vs.

Edward E. O'Brien,
Respondent and Appellant.

Brief for Respondent

In Opposition to Petition for Certiorari.

GEORGE A. BLACK,
Of Counsel.

John Polhemus Printing Co., 121 Fulton St., N. Y.

U. S. Supreme Court.

BRICE ALLAN MILLER *et al.*
Libellants,

vs.

EDWARD E. O'BRIEN,
Respondent.

Respondent's Answer to motion for Certiorari.

The libellants petition for *Certiorari* in its fourteenth article asserts six reasons for granting it. It will be noticed that there has been a straining after numbers and to attain multiplicity the same point is repeated more than once.

The interpretation of the bond by the circuit Court of Appeals being different from that of the District Judge (to whom as a *make-weight* is added the Hamburgh lawyers), is no reason for a *Certiorari*, unless the same circumstance would *always* lead to this result, and manifestly this is not so.

The "disagreement" of reason No. 1, is not different from the "conflict" of reason No. 2; and the "conflict" repeated in reason No. 3 is precisely the same as Nos. 1 and 2, *i. e.* that by its wording, the bond being expressly made void by the "utter loss" of the Andrew Johnson, such result in the opinion of the C. C. of Ap. followed that event.

The ingenuity of counsel has been strained to make the surviving *right of action* against the Thirlmere the same as the *actual existence* of the Andrew Johnson.

Whatever rights might flow from the collision and loss of the Andrew Johnson clearly *the collection of the bond from the obligor* or its enforcement *in rem* against the libellants' cargo, was not one of them. The libellants paid the *bond* as a valid lien on their cargo, without contest, and by reason of that *payment* seek to recover from respondent.

The 4th "reason" is not presented by the pleadings or proofs. The action was to recover *because* the bond was paid by the libellants; if the bond was not due, or was void, or avoided, the payment gave rise to no claim against respondent.

In the **ninth** article of the petition the proceedings in the English court are briefly referred to, and it is stated that "libellants received such proportion of the value of the Thirl-" mere as was due them *in respect to the cargo sunk with the* " *Andrew Johnson.*"

On the trial of this appeal respondent put in evidence the following stipulation, and the fact that libellants appeared and contested with respondent in the Thirlmere limitation proceedings is referred to in the opinion of Judge Lacombe: (301)

"It is hereby admitted that Brice Alan Miller and others "composing the firm of Gibbs & Company, of Valparaiso, "Chile, appeared personally or through their authorized "agents, Henry Hucks Gibbs and others, composing the firm "of Anthony Gibbs & Sons, of London, England, in a certain "proceeding instituted in the High Court of Justice, Admiralty "Division, by James Fisher and others, owners of the Thirl-"mere, against the owners of the ship Andrew Johnson and "others, to limit their liability, as owners of the Thirlmere, for "the loss of the ship Andrew Johnson and her cargo by colli-"sion with the Thirlmere, and that in said proceedings the "libellants, Brice Alan Miller and others received the propor-"tion of the value of the ship Thirlmere which was adjudged "to them as owners of the cargo laden on the Andrew Johnson.

"This admission may be read and accepted in evidence in "this cause in this Court or in any other Court in which it may "be deemed material and relevant, and in which further proofs "may be permitted."

Dated New York, July 11, 1894.

BUTLER STILLMAN & HUBBARD,
Proctors for Libellant.

Annexed hereto is the brief of respondent on the trial of his appeal, and it is respectfully submitted herewith.

April 24, 1895.

GEO. A. BLACK,
Of Counsel for Respt.

U. S. Circuit Court of Appeals

FOR THE SECOND CIRCUIT.

BRICE ALAN MILLER, *et al.*,
Libellants and Appellees,

vs.

EDWARD E. O'BRIEN,
Respondent and Appellant.

BRIEF FOR RESPONDENT.

Preliminary Statement.

This case brings up for adjudication the law of Bottomry and Respondentia, involving the authority of the shipmaster to pledge **the cargo transhipped by him on another vessel** (because his own vessel is incapable of carrying it), *for the cost of repairs to his own vessel.*

Statement.

Gibbs & Co., of Valparaiso (119) chartered (89) the American ship **Andrew Johnson** to carry a full cargo of nitrate of soda from Iquique and Caleta to a safe port in Europe, and loaded 19,943 bags of soda weighing 58,887 Sp. quintals, for which two bills of lading (85 to 89) were signed by **J. H. Killeran**, master, agreeing to deliver at Hamburg to Anthony Gibbs & Sons of London (119).

The **A. J.** sailed for Hamburg; met with heavy weather (79) and put in to **Callao, Peru**, as a port of refuge and repair

(79), where surveys were held, the first Aug. 4, 1884 (93 to 96), the second Aug. 23, 1884 (97 to 102). The second survey recites that the vessel had been lightened, "*having discharged about "900 tons of the cargo*" (97), recommended certain repairs and added (100):

"Taking into consideration the nature of the cargo, the "enormous strain it must bear on a ship of the dimensions of "the **A. J.**, *we are unanimously and decidedly of the opinion* "**that at least 1,200 tons of the cargo be for-**"**warded in another bottom,** and that with the above "repairs **and thus lightened,** she can proceed on her "voyage with safety. *This we consider to be in the interest of "both the owners of ship and cargo.*"

The recommendations of the surveys were carried out (81) and 8,449 bags of soda were transhipped by Capt. Killeran on to the Br. ship **Mary J. Leslie,** under a bill of lading dated Sept. 25, 1884, signed by Capt. McLeod (53 to 57), which agreed to deliver the soda at Hamburg to the same consignee; referred to conditions of the **A. J** charter-party and was endorsed:

"The 8,449 bags of nitrate of soda as per this bill of lading "are **included in and JOINTLY responsible with** "**the nitrate of soda specified in the Bottomry** "**and Respondentia Bond given to Messrs.** "**Grace Bros. & Co. AS SECURITY FOR THE** "**PAYMENT OF THE AMER. SHIP ANDREW** "**JOHNSON'S DISBURSEMENTS IN CALLAO.**"

The bond above referred to was given by Capt. Killeran (83) to Grace Bros. & Co.; it is set forth at fols. 39 to 51, and *recites the above recommendation of the surveyors to tranship* (42), the transhipment to the **Mary J. Leslie** (43), the debts incurred for repairs (43), the agreement of Grace Bros. & Co. to lend to Capt. Killeran "*upon his executing this present bond or obligation*, "and hypothecation of the said vessel, her boats and apparel, *and* "*her cargo, including that portion of the cargo transhipped* "*to, the Mary J. Leslie*" (45), and further reciting that "said "Grace Bros. & Co. are **contented** to stand to and bear *the* "*risk, hazard and adventure thereof* upon the hull, body or "keel *of the said vessel Andrew Johnson*, her boats, tackle, "apparel and furniture, together with the cargo laden on board "as aforesaid," and thereupon Capt. Killeran mortgages the "said vessel * * and her cargo, *including that portion* "*of the cargo transhipped to the Mary J. Leslie.*"

Then follows the condition or defeasance clause, providing for payment, in these words: (47) "If the **said vessel** shall forth- "with set sail from Callao aforesaid and without unnecessary "delay or deviation proceed on *her* intended voyage to Ham- "burg, and if the above bounden **James H. Killeran,** "shall and do within the space of five days next after the "arrival of **the** vessel at her final port of destination, * * "well and truly pay, &c., £2,212, 5s. 9d. * * principal * * and "£387 3s. maritime interest * * together £2,599 8s. 9d. * * "(49) **Or if during said voyage an utter loss of "the SAID vessel** by * * the perils of the sea or navi- "gation or any other casualty **shall unavoidably hap- "pen** to be sufficiently proved by the said James H. Killeran, "then and **IN EITHER OF SAID CASES** this obliga- "tion shall be **void.**"

The deposition of *Mr. O'Brien* (106) shows that he was the owner of the **A. J.** and (110) had knowledge **before the loss** of the **A. J.** of the above bond, but he could not say that he had that knowledge *before* she sailed from Callao.

Libellants made no proof that the cargo owners had any notice *at any time of the distress of the A. J. or of her need of funds, to be raised by bottomry of cargo.*

There was telegraphic communication (112). The *shippers and owners*, Gibbs & Co., were of Valparaiso, **Chile** (119). The consignees, Anthony Gibbs & Sons, of **London** (119).

After sailing from Callao the **Andrew Johnson** was sunk in mid-ocean by the Br. ship **Thirlmere** (84) and with all her cargo lost.

The A. J. was worth $60,000 (109), and insured for $30,000, valued at $60,000 by the Boston Marine Insurance Co. (see policy 107), and that company paid the $30,000 to Mr. O'Brien January 6, 1885, and received back from Mr. O'Brien on April 2, 1886, as their share of the recovery from the owners of the **Thirlmere** $11,456.08, and about June 28, 1886, $35.60 (116).

The collision suit was prosecuted by Mr. O'Brien at an expense of $5,511 (115) and produced net for loss of vessel and freight about £5,000 (114), the owners of the Thirlmere having limited their liability, by paying into the English Court of

Admiralty £13,685 (254), of which Gibbs & Co., the cargo owners, were allowed more than one-half (259).

The Mary J. Leslie.

This ship arrived at Hamburg on Feb. 5, 1885 (143), with the 8,449 bags of nitrate of soda, weighing 2,033,764 pounds German gross, worth 9s. 3d per hundredweight there (146). Hugo Wirtz, of Hamburg, acted as the agent of A. Gibbs & Sons (120), and a demand was made on him for payment *by the holder of the bottomry and respondentia bond* (141, 143) "*on "the fifth day after the vessel's arrival*" (144), and the matter being referred to the London principals (120), they wrote the letter found at fol. 125, offering to submit the matter to **arbitration,** which offer was accepted by Baring Bros. & Co., for the bondholder (127).

The Arbitration.

This chapter of events opens with the statement of A. Gibbs & Sons (120): "My firm *doubted* their obligation to pay the "amount claimed under the bottomry and respondentia bond "made by Capt. Killeran," but on Feb. 11th (six days after the arrival of the M. J. L., (and without any communication with Mr. O'Brien), A. Gibbs & Sons made the agreement to arbitrate, and the arbitrators—two Hamburg lawyers, Stammann for A. G. & Sons, and Wolffson for B. B. & Co. (145)—on March 14, made their award (156 to 158), not based on the language of the bond, but on the *assumed* intention of the parties.

The Construction of the Bond by the Arbitrators.

The arbitrators divided their award into two parts. (**1**) Was the cargo on the *M. J. L.* liable for the *whole* of the money loaned at Callao?

This query they readily answered in the affirmative.

In doing so they did not enter into any examination of the facts to establish that the expenditure at Callao was necessary, nor *how much* of it was necessary, nor why the cargo shipped on the M. J. L. should be pledged to pay for the repairs to the A. J.

They gave but one reason (156), because "according to the "law here, ship, freight and cargo of the A. J., as well as the "portion of the cargo which was transhipped into the M. J. L., "are **JOINTLY** liable."

By § 692 of the German code (177) "all the bottomried "objects are jointly and *severally* liable to the bottomry "creditor."

This provision can only apply to German vessels.

But by § 507 "the master has only the right to hypothecate "the cargo * * when, **and in so far** as it is necessary "for the purpose of prosecuting the voyage" (fol. 189).

By § 686, the **necessity** is required to be established in the manner therein pointed out, and thereupon "it shall be "considered that the master has been duly authorized" (fol. 173).

(**2**) Was the loss of the **A. J.** an avoidance of the bond?

On this head the arbitrators said:

"*Some doubt* might be raised as to whether, according to the "wording of the bottomry bond, the money was not lent, or "*appear to be lent*, contingent upon the safety of the **A. J.**, "and becoming due only after *her* arrival at her port of des- "tination, but becoming null and void* in the event of her non- "arrival. We are of the opinion, however, that this interpre- "tation *is not consistent with the real intention of the con- "tracting parties*, and that the wording referred to has origi- "nated in the not sufficiently careful use and employment of a "form of bond which happened to be at hand" (157).

> **Note.**—It is obvious that the arbitrators have not construed the bond by the language used, but have assumed to make a new bond according to the *assumed* intention of the parties, and the very next sentence of the award shows this, and *shows also the blundering groping of illogical minds for reasons to misapply.*

"This seems the less doubtful to us *for this reason*, that if the "bottomry bond were interpreted in this manner *the cargo of "the Mary J. Leslie would be entirely liberated after the loss of "the Andrew Johnson occurred*†, and would not even bear a

*Queer grammar. What became null and void?

†Just here the *hiatus* commences. Of course the cargo of the M. J. L. would be liberated from all liability on the *bottomry bond.*

8. The District Court erred in holding that the bottomry bond was not avoided by the utter loss of the ship Andrew Johnson.

9. The District Court erred in not holding that at the payment by libellants of the bottomry bond was a voluntary payment of an unfounded and illegal claim.

10. The District Court erred in overruling respondent's exceptions to the libel.

11. The District Court erred in refusing to allow respondent to introduce new allegations in his answer and refusing to receive new evidence before final decree.

THE ISSUES.

Two issues **of law** are presented by the *second* and *third exceptions* (58), which are really decisive of this case.

Shortly put they tell the Court:

(1). You have no *admiralty* jurisdiction.

(2). The story of libellants presents no legal claim of any kind.

Stripped of verbiage **the libellants' story** amounts to this:

"You loaded my cargo on your unseaworthy ship (24), which, "by reason of such unseaworthiness, put into Callao, and there "repaired, and to raise money to pay for those repairs your "master (Capt. K.), **signed** a paper, called a bottomry bond, "by which **he** bound your ship and all my cargo (part of which "he had put on board another ship, the M. J. L., because your "ship the A. J. could not by repairs be made fit to carry all of "it) (24), to pay five days after **his arrival in your ship** "at Hamburg. Your ship, A. J., sailed and was lost, with so "much of my cargo as remained on board, by a collision with "the Br. ship 'Thirlmere' solely by the fault of the T. (32).

"The M. J. L. sailed and arrived at H. with part of my cargo "and there the bondholder demanded that I pay the whole "amount of the bond, your master (Capt. K.) had agreed to pay "*after the arrival of your ship, the A. J.* (47), and which bond "was to be **void** if she was **'utterly lost'** (49), and I paid

" that bond because I *believed* it was properly made and I *be-*
" *lieved* I was bound in the law to do so, and I *believed* I could
" not get my cargo without doing so (31). **The reason**
" **I so believed is, I was not fully advised of the**
" **circumstances**" (29).

" It is true that my cargo was not *damaged* by any unsea-
" worthiness of your vessel, and that **you are in no fault**
" **for the collision. Your master (Capt. K.) had**
" **no authority to bind my cargo, and my cargo**
" **was not in truth liable to pay the bond**, and I
" have done a very foolish thing and parted with my money
" without any need to do so, but I want you to pay me back
" all the same *and with interest.*"

Does the above narrative show a cause of *admiralty* jurisdiction?

Does it show any cause of action?

Of course the **essential elements** of the libellants' complaint are:

(**1**) That a **lien** was *created* on their cargo on board the **M. J. L.**

(**2**) That that lien **existed** and was **enforceable against it after the loss of the A. J.**

(**3**) That there was a **personal** *liability* of respondent to repay to them some or all of the amount secured by that lien;

(**4**) Or, that the respondent became in some sort a **trustee** for libellants by reason of respondent collecting from the ship **Thirlmere** the amount recovered by him for the loss of the **A. J.**

If either there was **no original lien** on libellants' cargo or it **ceased to exist** by the defeasance clause of the bottomry bond (*i. e.*, "*utter loss* of the A. J.") taking effect, the payment by libellants would be a voluntary payment of a claim which had no legal foundation, and they must bear it themselves:

Or,

If the respondent was not **personally** liable (*i. e.*, if the remedy of libellants is *in rem* only), or if respondent was not a trustee for libellants in enforcing the claim against the **Thirlmere** the libellants have no claim against respondent.

These propositions must be examined separately.

Caution.—Much stress has been laid on the *imagined* fact that respondent has received a benefit (*i. e.*, an *increase of value*, see fol. 258) by the repairs at Callao, and that some *moral or equitable* obligation exists to repay the cargo-owner, who has repaid the bondholder, whose money paid for the repairs.

The only **evidence** on this head is Capt. Killeran's testimony at fol. 198:

"*Most of our expense was incurred in transhipping cargo*; "and the repairs made at Callao were not of a permanent "nature."

It goes without saying, that dock expenses, surveys, etc., are not *repairs* of a permanent nature. Of course libellants concede that they are liable for the expenses incurred for cargo, and they only seek to recover that part of the money which they say was spent for the repairs to the A. J. (see Art. 7 of libel, fol. 33) and so the D. C. decreed (237).

While libellants paid over $12,000 (31) they only claimed $7,870.16 (34) and they only got $6,091.73 (273).

PRELIMINARY OBSERVATIONS.

First Observation.—By the second exception (15) to the second libel (6) libellants had distinct notice that their libel did not allege communication with the *owner of the cargo* before the bottomry on cargo was given.

The libellants' third libel (8) *attempted* to supply this defect by alleging "that libellants *not being fully advised of the circum-* "*stances*, and believing that the bond was properly and neces- "sarily issued, *assented*," which allegation is repeated in their fourth libel (29) and this (5th Art. of libel) **is denied by the answer** (61), but *no proof was given that they were advised at all.*

Second Observation.—The libel alleges (Art. 4, fol. 25), the transhipment by respondent of 8,449 bags on the Mary J. Leslie and that the respondent, "*in place of tranship-* "*ping the remaining portion of his said cargo in other bottoms*, "and forwarding the same to destination, **which would** "**have been a proper course to pursue,** did, **FOR**

" **HIS OWN ADVANTAGE,** and not for the advantage of " the libellants," repair the A. J.

Nota Bene.—This allegation of the libel must be given its full weight in determining the exceptions. No proof was given either way.

I have said above that "if there was no original lien, or if it " ceased to exist by reason of the *utter loss* of the A. J. the " libellants paid in their own folly and must bear the loss."

Such is the law, as laid down in Naylor *vs.* Baltzell, Taney's D., 68. Taney, *C. J.*: " It appears from the evidence in this " case that the present plaintiffs" (cargo owner) "stood by and " saw the whole cargo sold without appearing in the Admiralty " Court to defend it, **and without requiring from the " lender any proof whatever of the necessity " of the case.**

" In either alternative, therefore, whether the necessity did, " or did not exist, it would be unreasonable and unjust to " charge the ship-owner with the loss of the cargo arising from " the hypothecation at Pernambuco. **If justifiable it was " made for the benefit of the cargo** * * * **if " not justifiable it was lost by the negligence of " the plaintiffs,** to whom it was consigned and **who took " no measures to protect it."**

THE LAW AS TO BOTTOMRY OF CARGO.

The first enquiry will be: " What law shall be applied?"

The **"Andrew Johnson"** was an **American** ship hailing from Thomaston, Me. (77), owned by a citizen of the United States (106), chartered to Gibbs & Co., described in the charter party (88) as of Valparaiso, **Chili** (but whose names indicate **Englishmen**), who owned the cargo (119) shipped at Iquique (86). At **Callao, Peru** (51), the bottomry bond was made to Grace Bros. & Co., described (39) as carrying on business at Lima and Callao, and was to be paid at **Hamburg** to Grace Bros. & Co. or order (40). The Mary J. Leslie was a **British** vessel (40).

In **The Julia Blake,** 107 U. S., 418, the J. B. was **British,** owned by Peter Blake, of **Nova Scotia.** The

cargo of logs was loaded at Rio de Janeiro, **Brazil,** and was owned by Philip Mee, of **Rio,** Brazil; and advances had been made on it by Cunningham & Sons, of **New York** (claimants of the cargo).

She put into the **Danish** Island of St. Thomas and there gave a bottomry on cargo to the Bank of St. Thomas.

Presumably the bond was payable in **New York** where the vessel arrived and with the cargo was libelled.

Judge Waite said (p. 426): "Whether the rule to the extent "it has been carried in England, is in accordance with the "general maritime law of Europe, other than Great Britain, "or whether, since the Julia Blake was a **British** vessel, the "authority of her master in a **Danish** port is to be determined "by the English law, instead of the general maritime law, or the "law of Denmark, are questions we deem it unnecessary to "consider, **for in our opinion, even under the most "liberal construction OF ANY RECOGNIZED "RULE which can be invoked for the authority "of the master OVER THE CARGO, this bond "cannot be sustained."**

The Supreme Court applied all rules to the facts of the Julia Blake's bond on cargo, and found that the bond was **outside** of them all, and therefore void. It is therefore enough to condemn the A. J's bond *on cargo* to show that the same facts exist and therefore the same law applies to them.

Judge Waite, proceeding to develop what the recognized rules were, said (p. 426): "The master can neither sell nor *hypothecate* "*the cargo*, except in case of urgent necessity and *his authority* "for that purpose is *no more* than may reasonably be implied "from the circumstances in which he is placed.

"He acts for the owner of the cargo because there is a neces- "sity for some one to do so and *like every agent whose authority* "*arises by implication of law*, **he can only do** what the "owner if present **OUGHT** to do. **Necessity** develops his "authority and **limits** his powers."

Judge Waite then showed what the "*necessity*" was, and (p. 427) quoted from Judge Washington in **Ross vs. the Active,** 2 Wash. C. C., 237. "But at all events the *necessity* "must be such as to connect the act with the success of the

"voyage and not for the exclusive interest of the ship owner," and also (p. 428) quoted from the **Amelie,** 6 Wall, 27. "And "this *necessity* is a question of fact to be determined in each "case by the circumstances in which the master is placed **and** "**the perils** to which the **PROPERTY is exposed.**

"*If the master can within a reasonable time consult the "owners he is required to do it,* **because they should have an opportunity to decide whether, in their judgment,** a sale is necessary.

Nota Bene. If judgment is to be exercised, knowledge of the facts is essential, and when libellants allege in their libel (29) "*libellants not being fully advised of the circumstances* * * "*assented*"—they show that they had an absolute defence to the bond in question.

The libellants when they allege (25) that a transhipment of the entire cargo "*would have been a proper course to pursue,*" and that respondent repaired the A. J. "*for his own advantage* "*and not for the advantage of the libellants,*" they also negative the idea of a *common* interest calling for expenditures which would justify pledging the cargo.

Judge Waite then (p. 430) considered the facts of the Julia Blake case and said: "She came in dismasted and leaky 'for a "'general equipment and refit' **with a cargo substanti-** "**ally imperish able,** which might be forwarded in "another vessel at comparatively small expense, and it must "have been easy to see that to repair the vessel **at the risk** "**of the owner of the cargo,** would be to place his "interests in jeopardy *without any urgent necessity on his* "*account.*"

"No master who 'held the balance evenly between his two "'principals,' could have believed himself justified under the "circumstances, in hypothecating the cargo for any such pur- "pose, **without notice to the owner."**

Nota Bene.—What closer parallel could be found between facts? The *nitrate of soda* on the A. J. was just as **imperishable** as the logs on the J. B., and all could have been as easily forwarded as the part on the M. J. L.

At all events the burden lay on the libellants (whose claim arises out of the peculiar position they had put themselves in

by paying the bond) *to establish all the facts* necessary to give it validity. This also is established by the "Julia Blake" where Judge Waite said (428) "Before there can be a recovery "against the owner, *it must be shown* that the circumstances "were such as to make it *apparently proper* for the master to "do what he has done."

"To this extent the burden of proof is clearly "on the lender. The Aurora, 1 Wheat, 96; Thomas *vs.* "Osborn, 19 How., 22; The Amelie, 6 Wall., 18; The Grape-"shot, 9 *id.*, 129; The Lulu, 10 *id.*, 192. In these cases the rule "was applied to the hypothecation *of the ship* by the master, "**where less strictness will ordinarily be re-**"**quired,** than in the hypothecation of the cargo *because the* "*master is the* **appointed** *agent of the owner of the ship*, "but the **involuntary** agent of the owner of the cargo."

Judge Waite on the same page had already stated that "a "lender is *presumed to know that the power of the master is to* "*be determined by the necessities of the case, in their legal* "*operation on the owner of the cargo.* As necessity creates the "agency, and **that only can be authorized** *which* "*under the circumstances, is reasonable and just*, he must "make his own inquiries and judge for himself **and at his** "**own risk,** whether, if the owner were present he **would** "**do or ought to do that,** *or something equivalent, which* "*the master is undertaking to do for him, in his absence.*

Three propositions of law are thus established:

1. The facts showing *necessity* must exist.

2. The bondholder *has the burden* of proving the existence of the necessity.

3. *Strict* proof is requisite.

And when all the above has been complied with *the bond-holder has yet to show* the **fundamental fact,** that the cargo-owner has had a fair opportunity of exercising his judgment.

Caution. It is necessary to avoid the possibility of confusion arising from the master being the agent of two principals. What he does as agent by necessity for the owner of cargo is binding only if within this implied authority, but is in no sense

the act of the owner of the ship—or capable of creating a *personal* obligation on him.

The ship Virgin (1834) 8 Peters, 554, Story, *J.*: "But "beyond this (*i. e.* value of the pledge) there is no *personal* obli- "gation upon the owners."

The English Cases.

Judge Waite, in the *Julia Blake*, 107 U. S., 426, cites:

The Casa Marittima, 2 Ap. C., 156.
The Bonaparte, 8 Mo. P. C., 459.
The Hamburg, 2 Mo. P. C., N. S., 289.
Cargo ex-Sultan, 1 Swabey, 504.
The Gratitudine, 3 C. Rob., 261.
Duncan v. Benson, 1 Exch., 557.
The Onward, L. R., 4 Ad. & Ec., 57.

I add extracts from some of the above, and others more recent, and call attention to the discussion of principles therein.

The Lizzie, (1868) L. R., 2 Ad. & Ec., 254.

The Lizzie, wood-loaded, from Minatitlon to Liverpool, put into Key West in 1865 to repair sea damage.

The master, before hypothecating the cargo, **did not** communicate with the cargo-owner, "by reason of the great delay "and uncertainty in the transmission of letters from Key West, "**at that time**" and raised money on bottomry of vessel, freight and cargo, for which *they were all* libelled on arrival at Liverpool. The case went by default against ship and freight, but the cargo-owner contested the validity of the bond, which was enforced by Sir Robt. Phillimore, who said, p. 260: "I "rememember that, while by a decision in favor of the validity "of this bond the interests of the *bona fide* lender will be pro- "tected, *the owner of the cargo has* under the authority of Dun- "can *vs.* Benson, 1 Ex., 537; 3 Ex., 644; **his remedy over** "**against the owner of the ship.**"

> **Nota Bene.** In this case the vessel arrived safely. Whether that fact would give a right of action against the owner **in personam**, is a point of law on which the English authority differs from the American. Conceding (but not admitting) that the cargo-owner might have a lien on the vessel, goes very little way to establish the *personal* liability of the ship-owner.

Sir Robt. Phillimore based this decision on *the special cir-*

cumstances, saying (p 259): "Upon the whole I am of "opinion that the circumstances of this particular case, do not "bring it within the principles *which render a communication "from the* master to the *owners* **a necessary PRECE-"DENT CONDITION** *to the validity of a bottomry bond "which hypothecates the cargo.*"

At p. 258 he says: "Now the principles of law which I must "apply to this case are those laid down by the Lords of the "Privy Council in the Buonaparte, 8 Moore P. C., 459* and the "Hamburg, Brown & Lush., 253.

"**There is no doubt** that, according to the authority of "these cases, as well as that of the Gratitudine, 3 C. Rob., 261, "which they followed, "the character of **agent for the** "'**owners of the cargo,** is imposed upon the master by "'the necessity of the case and by that alone.' And by the "two former cases it has been established as a **necessary** "**consequence** of that proposition, that the master, **before** "he hypothecates the cargo ought, if he have according to "reasonable intendment the means of doing so, to communicate "with the owner.

"For what purpose?

"It has been said by the counsel for the bondholder, merely to "give the *owner* an opportunity of advancing the requisite "funds; but I cannot think that this is the only ground which "necessitates the communication. Another ground would "surely be **to give him the opportunity of unlad-"ing the cargo altogether.** I think, indeed, he could "not do this without payment of the entire freight. I am not "aware of any English decision directly upon this point, but "the language of jurisprudence appears to be in accordance "with the Rhodian law:

"'Si vero mercator eximere merces voluerit naulum integrum "'exercitori solvat'.

"'Dès qu'une fois', Boulay-Paty observes 'l' affréteur a "'commencé à charger ses marchandises dans le navire, il ne "'peut plus les retirer qu'en payent la totalité du fret con-"'venu, si le navire part *à non chargé* (Cours de Droit Mar., "'Vol. 2, p. 380, ed. 1834.')"

---

*In Kleinwort *vs.* Casa Mar., 2 P. C., 157, it is pointed out that the report of the Buonaparte in 8 Moore P. C. is defective, and the correction is there given.

"*If there be an opportunity for the owners to express their "will as to either of these two grounds with respect to their "cargo, the master,* **who is the agent, of necessity "and not of their choice,** *has no right to deprive them "of this opportunity, and, therefore, must communicate with "them if it be reasonably within his power to do so.*

"In the case of the Hamburg, Brown and Lush., at p. 274, their "Lordships said: 'Where the cargo belongs to a single "'individual, known to the master, the ship in a port in the same "'country, or near to it, in which that owner is resident, the "'means of communication sure and speedy, the probable "'delay inconsiderable, the cargo not of a perishable kind, the "'money to be borrowed so large as to be sure to bring it with-"'in the operation of the bond, *it could not be contended that "'the master could properly hypothecate it for the repairs of "'the vessel without* **first communicating with the "'owner.**'"

At p. 256, Sir R. P. states another limitation on the *agency* of the master as follows:

"The true question is whether, having regard to all the "circumstances it is such an agreement *as an honest and pru-"dent master* would, for the *benefit of* **all** *parties*, the owners "of the ship as well as of the cargo, have entered into."

In the **Karnak** (1868), 2 Ad. and Ec., 293, Sir Robert Phillimore examined the origin and growth of the bottomry (so-called) of cargo, and pointed out that it was "*built up slowly*" by the judges, who derived the material of their decisions from that excellent source "**the reason of the thing.**"

He further says: "This power of the master arises out of his "relation as agent, both to the owner of the ship and to the "owner of the cargo. *A material distinction*, indeed, *exists "between his authority as agent for the one and as agent for "the other*, but in both cases his power to hypothecate, like "his power to sell, *arises out of the necessity of the case.*"

At p. 308, Sir R. P. says that the doctrine of the necessity of communication by the master with the cargo-owner is peculiar to the English law.

At p. 309 he refers to the Lizzie (*ante* p. 254), and says the duty to communicate "arises from the peculiar character of his "(master's) relation as agent for the shipper, a relation forced "upon him for the nonce by a temporary necessity, **and,**

"**therefore, different from his original and** "**abiding relation as agent for the owner of** "**the ship.** * *

"The law looks with jealousy upon the exercise of authority " by the master over the cargo."

At p. 310, Sir R. P. quotes Lord Stowell in the Gratitudine (3 C. Rob., p. 261). "'In all cases **it is the prospect of** "'**benefit to the proprietor that is the founda-** "'**tion of the authority of the master.** It is, there-"'fore true that **if the repairs of the ship produce** "'**no benefit or prospect of benefit to the cargo,** "'**the master cannot bind the cargo for such** "'**repairs.**'"

The Karnak (1869), 2 P. C., 515. Sir Wm. Earle: "The " learned counsel also urged as an argument, the policy of the " law in making bottomry a good security, *but it must not be* " *made a good security by violating the rights of others.*"

The Panama (1870), L. R., 3 P. C., 199: The Panama was chartered at Liverpool for a voyage to Cuba and back. £500 was to be advanced in England and F. (her owner) was to give a second mortgage to secure the advance, which he did.

The Panama loaded outward for Cardenas, consigned to Finlay & Co., of Havana, delivered her cargo at Cardenas, was subchartered to load from Trinidad de Cuba back to Liverpool by Finlay & Co., who advanced £250 as provided by charter, and also a further advance of £250. After loading at Trinidad de Cuba the master, without communicating with his owner, made a bottomry for £318 in favor of the charterers (B. & H.) and sailed; put into Cardenas in distress, where the master threatened to sell cargo, and, upon news thereof, Finlay & Co. telegraphed charterers (B. & H.), who instructed them to advance on bottomry, and a new bottomry for £741 was executed by the master. **No attempt was made** to communicate with **the owner or the first mortgagee,** and the vessel being libelled for the second bottomry (the first being abandoned), the first mortgagee contested (p. 201), and on a reference to the registrar he reported that **the bond was invalid** because no communication had been given to the owner or mortgagee, and Sir R. Phillimore having affirmed the registrar

(2 Ad. & Ec., 390), appeal was made to the P. C., where the cause was heard by Lord Romilly (M. R.), Sir J. W. Colville and Sir Jos. Napier (p. 199, note).

The Master of the Rolls delivered the opinion, and said (p. 203): "*It was absolutely necessary in this case to give* "*notice to the owner* * * . Their Lordships think that this "is not a technical matter, but a matter of substance."

Australasian S. N. Co. *vs.* **Morse** (1872), L. R., 4 P. C., 227. Ship Boomerang, loaded with wool, belonging to nineteen different consignees at Sydney, struck a rock near Rockingham (900 miles from Sydney, p. 224) and filled. The disaster occurred on Dec. 21 (Thursday), and on Dec. 26 (Sunday and Christmas Day intervening) the wool was sold by the master without communicating with the owners of the wool.

The suit was for a conversion of the wool (p. 223).

Sir Montague Smith pointed out (p. 235) that the ship was a *general* ship, and thought that made a difference in the *degree* of diligence the master owed, and he also pointed out the fact that Sunday and Christmas intervened and thought the jury justified in finding the master *excused* for not telegraphing, saying (p. 234): "**There can be no doubt that the** "**master is bound to employ the telegraph** as a "means of communication where it can be usefully done."

Smith vs. Bk. of N. S. Wales (1872), 4 P. C., 194. Bottomry on ship Staffordshire and freight from Melbourne to Callao *and from thence to any other port or ports* payable 7 days after her arrival at Callao (p. 197). Lord J. Mellish (209): "It is objected that though the bond may be generally good, "yet it *is bad as respects subsequent freights* * * (p. 210) and "their lordships are of opinion that subsequent freight cannot "be hypothecated for this reason: That by the very nature of "a bottomry bond the person who takes it is to become "liable for the maritime risk, and therefore **nothing can** "**be hypothecated except something which is** "**in danger of perishing by maritime risk dur-**"**ing the time that the bond is running.**"

> **Note.**—The cargo on the M. J. L. was not at the risk of the bondholder, for his debt would not be lost by the loss of the cargo of the M. J. L. so long as the cargo of the A. J. still remained liable for the loan.

The Onward (1873), 4 Ad. and Ec., 38. The Am. ship O. put into Mauritius in distress (p. 39). After repairing, her master gave a bottomry on vessel, freight **and cargo** for £6,238. The master notified his owners, but neither he nor they notified the owner of the cargo before the bond was given and the ship had sailed (p. 49). *Cargo owner defended* (p. 39).

Sir R. Phillimore (p. 42) said, p. 51: "According to the "law the master is **always** the agent for the ship, *and in* "*special cases of necessity, the agent for the cargo also.* He "is the *appointed* agent to the former, the involuntary agent of "the latter. From these principles of jurisprudence two im- "portant consequences flow:

"First: When the circumstances permit, the master **must** "communicate with the owner before he does any act which "seriously affects the value of the ship in the one case *or of the* "*cargo in the other.*

"This is a doctrine at which **the English courts** have "**SLOWLY** but steadily arrived * * (p. 52). The owner "might well have thought it for his interest either to advance "the requisite funds for the repairs *or, to pay the full freight* "and to embark it in another vessel."

Judge Phillimore then speaks of the suggestion that the cargo-owner can pay and recover from the ship-owner, and says (p 52): "He is domiciled in New York and I cannot discover "that the doctrine of the English decision in Duncan *vs.* Ben- "son, 3 Ex., 644, has ever been judicially recognized in that "country.

> **Note.**—Judge Phillimore had held the bond was valid in the "Lizzie" E. R., 2 Ad. & Ec. 254, saying at p. 260: "I remember that while by a decision in favor of the "validity of this bond, the interests of the *bona fide* "lender will be protected, *the owner of the cargo has* "under the authority of Duncan *vs.* Benson, 1 Ex. 537, 3 "Ex. 644, **his remedy over against the owner "of the ship."** The contrast of these two decisions affords a curious study for the critic. They do not seem based on any settled rule of law.

"*A communication was, therefore, in my opinion indispens-* "*able in the circumstances of the case to the validity of a bot-* "*tomry bond on the cargo.*"

Nota Bene. Here was an American ship in a French

port with an English cargo borrowing on bottomry from Houdlette & Co., merchants, residing at Port Louis (p.39).

Sir R. Phillimore then cites the **Oriental**, 7 Moo. P. C. 398, where the P. C. reversed Dr. Lushington and held a bottomry void for want of communication, and quotes Sir John "Jervis: "Here being the means of communication **AND** "**THE AUTHORITY OF THE MASTER BEING** "**FOUNDED ON THE IMPOSSIBILITY OF COM-** "**MUNICATION,** their lordships are of opinion that there "was no authority in the master to raise money on bottomry."

> **Note.**— By § 504 of the German Code (fol. 188) it is made the duty of the master to see "*that those interested* "*in the cargo are speedily informed of such occurrences* "*and of the measures thereby rendered necessary.*

Sir R. Phillmore also refers (p. 56) to the case of the "Lord Cochrane," 2 W. Rob., 333, which he says was "*decided in 1844* "**before** the law as to the necessity of communication had "been distinctly laid down."

And at p. 57 he discusses the limits of the master's authority to represent and bind the cargo owner, saying:

"The next consequence from the doctrine of agency is that "the master must sustain to the best of his power the interests "of the absent owners. *This is a principle of general mari-* "*time law*, and not like the former one of English law only. "Boulay Paty observes: 'Il est le représentant des chargeurs "'absens; il *doit* faire ce qu' ils feraient euxmêmes s' ils "'étaient sur les lieux,' Coms de Droit Com. Mar., tom. 2, p. "404, ed. 1834—that is, he *must do* that which there is fair rea- "son to suppose the owner, if present, would do. 'Il est donc' "(Emerigon says), '*obligé* de faire ce qu' il est à présumer que "' feraient les chargeurs s' ils etarent présens.'

"The master is to remember the **foundation of his au-** "**thority** *to give a bottomry bond on cargo, is the prospect of* "**benefit,** *direct or indirect, to the proprietor of it.*" **This principle limits the authority of the master in this matter**, and he quotes Lord Stowell in the "**Grati-** "**tudine,**" 3 C. Rob., 261, "that if the repairs of the ship "produce no benefit, or prospect of benefit, to the cargo, the "master cannot bind the cargo for such repairs." (A sentence Sir R. P. had already quoted in the Karnak (1868), 2 Ad. and Ec., 310.) Bond declared void.

Kleinwort vs. Casa Mar. of Genoa (1877), 2 Ap. C. 156.

Appeal to P. C. from Sup. Ct. of Ceylon. Appeal heard by Ld. Blackburn, Sir J. W. Colvile, Sir Barnes Peacock, Sir M. E. Smith and Sir R. P. Collier. Opinion delivered by Sir Montague E. Smith.

Ship Maria Louisa sailed from Rangoon, with rice, to Cowes, for orders, in July, 1872, and in September, 1872, put into Trincomalee in distress (p. 158) and repaired, and the security of the ship alone *not being sufficient* for the advances, bottomried hull, freight and cargo to the C. M. of G. on March 12, 1873 (p. 159).

The cargo was landed in T., stored and reshipped in good condition (p. 159).

The ship sailed April, 1873, put into Pt. de Galle in May, and in August, 1873, the cargo was sold at Galle in a perishable condition (p. 160). An action was brought on the b. bond, and the cargo owner defended (156), and judgment was given against the bond in the lower court, reversed in the Supreme Court, and appealed by cargo owner.

Sir M. E. Smith (p. 158) cited the Onward, 4 A. and E., 55, and the words of Sir John Jervis, in the Oriental, 7 Moo. P. C., 411, quoted by Sir R. Phillimore, and the conclusion he came to and added : " In this view of the law their Lordships *entirely* agree," and at p. 160 said :

" The duty of the master to communicate with the owners, " or those who may be fairly taken to represent the owners, be- " fore taking this *extreme* step, being plain, let us see what he " did," and at p. 162 criticised the judgment of the Court below in holding that it became the duty of the cargo owner, on hearing of the ship's distress, *to offer money*, and said :

" Their Lordships think no such duty was imposed upon " Gerber, Christien & Co. (cargo owner)."

The **Pontida** (1884), 9 P. D., 177, came before the Court of Appeals (Brett, Bowen & Fry, J. J.,) on an appeal from Butt, J. (9 P. D., 102)—The P. was an Italian vessel, and the bottomry was given to an Italian banker at St. Michael, and covered hull and cargo. The cargo owners resisted as to the *amount* of the bond, which was reduced by the Registrar and merchants by £700, and their report was confirmed by Butt, J. (p. 105). On appeal by the bondholder Brett, M. R. commented

on the *principles* on which the Court proceeded in such cases, saying (p. 178): "When an action is brought on a bottomry "bond the *first question* is, whether the Court will decree for "the bond **at all.**

"It does not follow that *because the bond exists* the Court "will recognize its validity, *for this depends upon the prelim-* "*inary inquiry* **whether the bond was entered** "**into in a manner to bind the owners at all.**

"This jurisdiction of the Court has been of extreme import- "ance to shipowners and cargo owners, for a long series of "cases has shown that *if the Court exercises its jurisdiction* "*with* the **laxity** ship-owners and *cargo owners* will in some "circumstances be **practically robbed.** * * * There- "fore the Court has always looked strictly into a bottomry "transaction, and has refused to pronounce for the validity of "the bond *unless* it was entered into in *good faith.* * * *

"(**P. 179.**) The question of *bona fides* affects only the *pri-* "*mary* question whether the bond is **at all** valid or not.

"But if the bond has been pronounced to be valid * * it "will be **bad** *as regards each item, to the extent by which* "*such item exceeds the amount* **which was actually** "**necessary.** * * *

"(**P. 180.**) The question of reasonable inquiry by the lender "has never been the test of the liability of the ship-owner.

"I think, with deference to the Privy Council, that their "language in Prince of Saxe Coburg, 3 Moo. P. C., 1, was not "quite so precise as could have been wished; I think that the "language in that case applies to the *bona fides* of the lender, as "affecting the validity of the bond *ab initio* and *whether it* "*should be pronounced for at all.*

"For if a bond is entered into without the least care or "inquiry, or with the intention of imposing on the ship-owner, "it justifies the Court in declaring it to be void.

"But the rule that a bond *though valid*, is so only to the "extent to which money is **needed** for the actual necessities "of the ship, **is founded on the doctrine that,** by the "law of England, **the master in a foreign port has** "**NO AUTHORITY to bind the ship-owner or** "**CARGO-OWNER except in case of NECESSITY.** The rule should be even **more stringent as regards** "**the cargo-owner,** for the master does not take the goods

"on board as his agent **and is not his agent at all,** "**unless an OVERRULING necessity** arises during "the voyage."

Bowen, *J.*, concurred, saying (p. 180): "The master is only "the agent to bind the cargo-owner in the hour of necessity, "**and his AUTHORITY must be measured by** "**this principle.**"

And at p. 181, he points out "that the opinion of the lender "cannot **extend** the authority of the master."

With the foregoing enunciation of the law to guide the judicial investigator in the solution of the question in hand, let us see what the status of the *bondholder* of this bottomry-bond would be if now seeking to enforce it against the cargo of nitrate on the **Mary J. Leslie.**

1. He must prove a communication of the facts sufficient to allow the intelligent exercise of the judgment of the cargo-owner.

And he has not done so.

2. He must prove a *necessity* in respect to this *imperishable* cargo.

And he has not done so.

3. The proof must be *strict.*

4. If the matter is left in doubt in any degree, as the burden of proof is on him, he has failed to establish the authority of the master to bind the cargo and therefore has failed to establish a lien on it.

The E. I. Morrison, 153 U. S., 212.

"If the determination of this question is left in doubt, that "doubt must be resolved against them."

By a singular oversight the District Judge utterly failed to consider **whether the bond was a good bottomry of cargo,** although his attention was directed to the necessity of notice to the cargo-owner by the exception (15) which he disposed of as insufficient (203), overlooking the fact that the averment of the fact was essential, and making the *obvious* mistake of accepting a statement of a *conclusion of law* (*i. e.*, "*lawfully executed*") as the equivalent of the allegation of a fact.

Bonnell *vs.* **Griswold** 68 N. Y., 298. "Facts and not conclusions of law are admitted by a demurrer." Dillon *vs.* Barnard, 21 Wall., 430.

Judge Brown speaks of the "averments that the expense incurred was necessary" (204). The last amended libel speaks of "expenses in making *necessary repairs*" (26) which is by no means the equivalent of a *necessity as to cargo*, nor would it justify or excuse the failure to inform the cargo-owner so that he might intelligently exercise his judgment.

To summarise. The cargo on the M. J. L. was not pledged by a valid lien:

(1) Because no necessity existed to justify the master of the A. J. binding it for repairs to that vessel.

(2) Because no notification of all the facts was given to the cargo-owner.

(3) Because the *burden* rested on the bondholder to prove by *strict* proof the necessity and the due notice.

Therefore the cargo-owner paid the bond without justification.

THE ERRORS OF THE DISTRICT JUDGE.

Although an admiralty appeal is a new trial, "*completely and entirely new*" (The Chas. Morgan, 115 U. S., 75), yet the arguments advanced by the learned District Judge have to be met and overcome, and all the more so because they are the *judicial* view as distinguished from that of the paid advocate, and therefore are received with less scrutiny by this court.

1. As heretofore pointed out, Judge Brown accepted the *validity of the bond as creating a pledge of cargo* without discussion, and confined his attentions to the language of the *defeasance clause* (1st Opin., 204 to 213; 2d Opin., 225 to 230).

2. In his first opinion (207) Judge Brown says: "*The construction of the instrument itself is not free from difficulty*," and points out that by the *recital* in the bond (45) Grace & Co. "*are* **contented** to stand to and bear the **risk, hazard**

" **and adventure thereof,** *upon the hull, body or keel* " *of the said vessel Andrew Johnson, her boats, tackle, apparel* " *and furniture, together with the cargo laden on board as* " *aforesaid and the freight to be earned and become payable* " *as aforesaid.*"

Yet he immediately proceeds to assume that they did not *intend* to be *so contented*, but meant to be contented with that *and something else.*

Judge Brown further quotes (208) the provision that the bond shall become void in two ways viz.:

(**1**) " If the above bounden James H. Killeran" (Master of the A. J.) " shall within the next five days after the arrival of " the vessel" (on which he was master and which was to sail " '*forthwith from Callao*,' 46) " at her final port of destination " * * *pay* to Grace Bros. & Co., etc., etc."

" **or**"

(**2**) " *If during said voyage* **an utter loss** *of the said* " *vessel by* * * *perils of the sea* * * *shall unavoidably* " *happen* * * **then and in either of the said** " **cases,**" etc.; but he very strangely (although quoting the language) fails to give any effect to the very express words " **in either** *of the said cases*," saying (fol. 211): " I think " **that** the '*obligation*' that by the condition is to become void " may be fairly construed as intended to mean *only the personal* " *obligation*, or agreement to *pay* the loan, leaving the *pledge* " operative upon any salvage recoverable."

Note the *antithesis* of the *defeasance* clause: The bond is to be **void** " *in either of the said cases*" which cases are:

(1) The *payment* by Killeran.
(2) The *utter loss* of the A. J.

And yet Judge Brown construes it to be valid after the *utter loss*, as a *pledge* but not as a *promise.*

A judge who desires to get at the correct interpretation of a contract is permitted to put himself in the place of the contracting parties (*not of one, but of both*), and to do so may be informed what the attendant circumstances were.

Merriam *vs.* U. S., 107 U. S., 437.

If Judge Brown had done so, he would have found that Capt. Killeran was an agent with a *limited authority* who was bound

to secure for his absent principals all the advantages he fairly could, and that he was dealing with *lenders of money*, who, **in person,** protected their own interests as creditors, and did so *by taking a lien on the absent cargo owner's property with the satisfactory interest of* **seventeen and one-half per cent.** (48) **for a loan to be repaid in** *less than* **six months**,* and who in the bond (39) are recited to be *carrying on business* (*presumably* of a like kind and *presumably* with perfect familiarity with all its requirements) at Lima and Callao (the latter *recited* to be a *port*, meaning a sea-port). Further pursuing his researches, the learned Judge would have found that these creditors **knew** that the *competent* surveyors (42), as recited in the bond, had recommended that certain *repairs* be made to the Andrew Johnson, *but had likewise* (*presumably* at the same time) recommended that a portion of the cargo, brought by her to the port of Callao, be there transhipped to another vessel, and that these creditors **knew** that 1,200 tons of that cargo had been transhipped on the Mary J. Leslie, and **knew that that portion of the cargo was in no degree benefited by the repairs to the Andrew Johnson**, and **knew** that the master of the A. J. had no authority to pledge that 1,200 tons of cargo for those repairs.

Having thus put himself in the place of the contracting parties, a careful as well as learned Judge would then read the bond with due care, weighing its words as symbols used to *express* (and not conceal) the *real* intention of the parties, and when he came to the **attestation clause** (50) he would be struck by the fact that Capt. Killeran had signed it in *original*, in *duplicate* and in *triplicate*, and had only signed (mark the words) **"after careful reading"** (50) (*presumably of each*); so that the learned Judge must have been immediately and forcibly struck with the *inane* remark of the "doctors of law" who say (120), "The wording referred to has originated " in the **not sufficiently careful** use and employment of " a form of bond which *happened* to be at hand."

The learned District Judge did not think this bond truly expressed the *intention of the lenders*, and this *unilateral* view was fortified by the consideration that "this is a *maritime* in-

* The bottomry was made Sept. 15th, 1884 (41), and the M. J. Leslie's bill of lading was dated Sept. 25, 1884 (55), and she arrived at Hamburg Feb. 5, 1885 (143).

" strument, to be construed liberally in favor of the bottomry " lender."

Before contracts are changed by the courts it is usually requisite to show that they do not truly express the intention *of both parties.* The Sophie Wilhelmine, 58 F. R., 893.

The very precise and formal manner in which this contract is drawn and the obviously **intentional omission** of a clause " *reserving any average that might be secured upon all salvage* " *recoverable,*" which Judge Brown refers to (210), and says, on the authority of Ins. Co. *vs.* Gossler, 96 U. S., 646, "*is usual in* **such** *full and formal instruments,*" instead of impressing him with the conviction that the parties (both of them) knew what they intended and knew how to say what they meant, is the basis of a contrary conviction in his mind.

Ins. Co. vs. Gossler (1877), 96 U. S., 653. Clifford, *J.:*

P. 655. " Where the bond covers the cargo as well as the ves- " sel, the lender, **unless** *the condition is otherwise,* is entitled " to be paid, even if the ship is lost, if enough of the cargo ar- " rives in safety to pay the bottomry loan.

" * * The rule is that if the *ship* is once bottomried the bond " attaches to the very last plank, and the holder of the bond " may have that sold for his benefit. Abundant authority ex- " ists for that proposition, *and the court is of the opinion that* " *the* **same rule** *is applicable to the cargo* **IN CASES** " **WHERE IT IS, WITHOUT CONDITION,** *cov-* " *ered by the bond.*"

Nota Bene. Judge Clifford recognized the difference where the " **condition** " he speaks of exists; this is the distinction respondent invokes in this case.

Judge Clifford refers to the case of **Del. Ins. Co. vs. Archer** (1832), 3 Rawle, 216.

Action on memorandum for a *respondentia* contract for $17,000, the security to be either $17,000 in specie, or $20,000 value of goods shipped at par, if specie should not be shipped, " *in* " *which case the lenders should only be liable to average* **and** " **entitled to salvage** *as if it had been a specie ship-* " *ment.*"

Note.—The specific clause "*entitled to salvage*" is here again used.

P. 217. "It appeared that it was part of the condition of the "respondentia bonds in use in the Delaware Insurance Office "that *the borrower is to account for 'a just or proportionate* "*'average or salvage of the goods shipped, and which shall* "*'not be unavoidably lost by fire, enemies, men-of-war or any* "*'other casualty.*"

Gibson, *J:* "Every profession or business necessarily has its "technical language, because *having the signification of its* "*terms fixed beforehand* by usage and common consent *they* "*not only express the meaning of those who use them with* "*more precision*, but are more comprehensive and less liable to "misconstruction than popular terms which have not the same "advantage in respect of certainty.

"It seems, as I have already said, that the lender is not liable "to average by the principles of the English law, *and it is* "*therefore usual to dispose of the subject by* **a special** "**clause** *in the contract.* * * The words *average* and *salvage*, "of course, relate to a partial loss."

Wood vs. Fisk, 63 N. Y., 249 (1875), Miller, *J.:*

"The question as to what the statute intended does not arise, "*for whatever the intention may have been cannot affect the* "**LANGUAGE EMPLOYED, so as to** *give a con-* "*struction to the instrument* **in contravention of its** "**plain meaning."**

Judge Brown thinks (211) that the provisions of "**nearly** all the Maritime **Codes**" must be regarded as aiding the interpretation of this bond. Why?

Was this American shipmaster, who was *an agent by necessity* for the *absent* cargo-owners, making a contract with any reference in his mind to foreign Codes: if so, which of the **nearly** all? and why not the excepted ones? Judge Story said in **The Virgin** (1834), 8 Peters, 554:

"It has been *correctly* remarked by Lord Stowell (The Nelson, "1 Hag. Ad., 176), that the form of bottomry bonds *is differ-* "*ent in different countries* **and so is their authority.** "In some countries they bind the owners; in others they do "not. * * In England and **America,** the established "doctrine is that the owners are not personally bound, except to "the extent of the fund pledged which has come into their "hands."

Appleton vs. Crowenshield, 8 Mass., 348 (1811); Story, *arg.* said as to bottomry: "Further, it is not a contract "of an universal nature or governed by any *general* law; *but* "*by the mere stipulations of the parties* * * that **no** "**implied agreements are to be added**; and that "it is to be *construed*, like other contracts, by what the parties "have done and said."

1 Parsons on Marine Ins., 221:

"There is *no salvage* or general average upon a bottomry "bond," (*i. e. none unless specifically given*).

Joyce *vs.* Williamson, 3 Douglas, 164.
Robertson *vs.* United Ins. Co., 2 John. Cases, 252 (per Kent, *J.*).
Glover *vs.* Black, 3 Burr, 394; 1 Wm. Bl., 396.
Jennings *vs.* Ins. Co., 4 Binn., 251.
Ins. Co. *vs.* Duval, 8 S. and R., 138.

The **brig Ann C. Pratt** (1853), 1 Curtis C. C., 349, Curtis, *J.*, speaking of a bottomry-bond said: "Now this is a con- "tract of a peculiar character, distinguishable by very marked "characteristics from an ordinary loan.

"Pothier, *Contrat à la Grosse*, N. 6, says: 'It differs from "'all other contracts; it forms a particular species by itself.'"

"Boulay-Paty, in his notes to Emerigon on Bottomry (Vol. 2. "p. 417, Ch. 1, § 2), uses the following emphatic language: 'It "'is neither a sale nor a partnership, nor a loan properly "'speaking, nor insurance, nor a compound of different con- "'tracts, *undique collatis membris*—but it is a contract having "'a specific name—*un* contrat nommé—and a character peculiar "'to itself.'"

Judge Brown says (213) the cargo on the M. J. Leslie as respects the lien was on her "precisely as if it had been *rescued* "by the M. J. L. from the A. J. a few moments before the lat- "ter went down in mid-ocean." Is not this rather strained?

But the idea he is trying to work out is, that although the *usual clause* reserving the salvage to the lenders is omitted (210), yet they are entitled to have the benefit of salvage, and so he twists the cargo on the M. J. L. into *saved* cargo, and bound by the bond, although, as Judge Clifford points out in Ins. Co. *vs.* Gossler, 96 U. S., 655, the *cargo* is only subject

to salvage when the cargo is "**without condition,** covered "by the bond."

If the A. J. was lost with her cargo by sea perils, the cargo-owners would get their insurance and the bondholders theirs.

But if the bondholders can make the cargo on the M. J. L. pay the bond, the cargo-owner cannot make the insurer pay any part of *that sum*, for it is not lost by a sea peril.

See Greer *vs.* Poole, 5 Q. B. D., 272.

Judge Brown, in his first opinion, correctly stated the American doctrine that the "*master has no authority to bind the "owner"* * * "*beyond the value of the ship and freight that "comes to the ship-owner's hands.*" Citing **Naylor vs. Baltzell**; Taney's Dec., 55:

(So also says the Supreme Court, by **Story, J.**, in **The Virgin,** 8 Peters, 538), and on this ground Judge Brown sustained the exception to the first (5) and second libels (7) and dismissed them, unless they were amended, and, thereupon, the **two amendments** set forth at fols. 8 to 12 were made, the first in January, 1889, and the second in October, 1890, making **three amendments** permitted to libellants, while the **only and most meritorious one** of *res adjudicata* asked for by respondent, was denied (70, 239 to 266).

The Last (4th) Libel.

An analysis of the ground of the decision (2d Opinion, 230 to 234), shows that the reason why respondent has been held liable is because he collected **a part of his damages for the loss of the Andrew Johnson from the owners of the ship Thirlmere.**

The Thirlmere Recovery.

It seems as if the District Judge had entirely lost sight of the fact the libellants are not the bondholders.

The Real Question.

What is the legal remedy of the cargo-owner who has paid a bottomry-bond on his cargo, given for repairs to the ship?

First.—The giving the bond did no injury to the cargo-

owner; if the ship pays, the cargo-owner suffers no loss. As the bond is the *act* of the cargo-owner, through his agent by necessity, it does not bind the ship-owner personally. Does giving the bond on the cargo bind the ship to the cargo-owner? If it does bind the ship does the lien exist in favor of the cargo-owner *before* he has paid the bond?

Does payment of the bond by the cargo-owner *extinguish the lien* of the bond?

Is the cargo-owner subrogated to the lien of the bondholder by paying the bond?

The latter seems to be the most favorable position for the cargo-owner. Let us consider it.

The bondholder had a lien on the A. J. and on the cargo—in other words he had two funds to resort to.

> **Nota Bene.**—The respondent denies the validity of the bond as a lien on cargo, and contends that libellants paid it in their own wrong, but for the purpose of the argument, now assumes its validity.

The lien of the bond on the A. J. was a property interest in her which the Thirlmere destroyed. This gave the bondholder an Admiralty lien on the T. to the extent of the injury to his lien.

The Empusa, 5 P. D., 6.

The cargo-owner was substituted in the shoes of the bondholder by paying the bond, and had all the rights of the bondholder against the T., and came into the English Court of Admiralty and asserted those rights.

See Answer (63)—See Further Proofs.

The libellants say in their libel that the respondent collected "through appropriate legal proceedings" from the owners of the T., £6,557 on account of the loss of the A. J.

Why did that English Court adjudge that sum to the respondent in a proceeding in which libellants were contesting with him?

Was it not because they must have held the *bond* void as to cargo or *avoided* by the "*utter loss*" of the A. J?

But if libellants claim that respondent received that money for the use of libellants, wherein will that benefit them in an *Admiralty* Court under the allegations of their libel?

Appleton vs. Crowenshield, 3 Mass., 448, was an action at common law *on the bond*, and the capture of the defendant's vessel was held to avoid the bond.

Appleton vs. Crowenshield, 8 Mass., 358, was an action *on an implied assumpsit for money had and received* to the use of the plaintiff, to recover the amount of same bond on the ground that restitution of the vessel had been ordered on the reversal of the decree of condemnation as prize, and that by treaty defendant had received from Great Britain the value of the vessel.

Have libellants any other remedy?

If the libellants stand in the shoes of the bottomry bondholder, and had a lien on the Thirlmere, *they have their lien still*, unless it has been discharged by some act of theirs.

The respondent was in no sense the representative of the lien of the bondholder. There was no relation of bailor and bailee of that *lien*. The *owner* of the ship A. J. had no right to sue for an injury to the bondholders' lien, for the shipowner owed him no duty to enforce it, and no liability existed against the shipowner by contract or by implication for failure to hold the tort-feasor liable for the benefit of the bondholder.

The Bondholders' Lien on the Thirlmere.

By the law of bottomry the bondholder becomes the *owner* of an interest in the ship on which the bottomry bond is given. This is shown by the following authorities:

Smith vs. Williams, 2 Caine's Cases in Error, 109. Lancing, Chan., cited 2 Valin, 61; Emerigon 386, 396, and concluded (p. 124): "That the owner of a ship covered by a "bottomry bond to an amount *beyond her value* has not an in- "surable interest," and at p. 120 gives his reasons: "For the "value of the ship being covered by the bottomry, the obligee "cannot recover the money advanced on it (the ship being lost), "his right to ceasing with the destruction of the ship. * * * "To this intent, **the obligee in the bottomry bond "must, therefore, be considered as owner, for "he is to receive nothing unless the voyage "be made."**

Read vs. Mu. Ins. Co., 3 Sandford, 54, Oakley, *C. J.* (p. 63), followed Smith *vs.* Williams.

Watson vs. Ins. Co. of N. A., 3 Wash., C. C., 1; and **Williams vs. North China Ins. Co.,** L. R., 1 C. P. D., 770, are to the same effect.

The 5th Assignment of Error (fol. 280).

The limit of libellants' interest in the recovery had from the Thirlmere was their *pro rata* in the net amount.

Assume that libellants stand in the shoes of the bond-holder—and is suing the Thirlmere for the injury to the bond-holder's lien (property rights) in the Andrew Johnson and that the owner of the A. J. and the libellants, in their capacity of cargo owners, are also suing the Thirlmere, each for his claim for damages to his property rights in the A. J. and her cargo—what right has the bond holder to claim any **priority of lien** against the **Thirlmere.** His rights, **as against her,** arise out of a tort, which same tort injured the property of others at the same time, and without their fault? On what principle of law is the bond holder entitled to a *priority of lien* against the Thirlmere?

The *net* amount (*i. e.*, deducting respondent's expenses of the suit against the T.) is all that the libellants could share in, *assuming they have any rights as against respondent*, which is denied.

Sheppard *vs.* Taylor, 5 Peters, 717.

The Insurance Co. Owned One-half of the Andrew Johnson.

The proofs show that the A. J. was worth $60,000 (109), and was insured at that valuation (see policy of Boston M. I. Co., 108)—for $30,000—*i. e.*, Mr. O'Brien stood his own insurer for $30,000, and on the loss of the A. J. the Ins. Co. paid him on January 6, 1885 (before libellants paid the bond), $30,000 (116), and **thereby became half-owner** in the claim against the Thirlmere, and as such half-owner received from Mr.

O'Brien their share (½, less ½ expenses) of the sum received by him from the Thirlmere, viz., $11,456.08 on April 2, 1886, and $35.60 on June 28, 1886, *i. e., more than one year before libellants sued at all* (3) and more than four years before they *amended* their libel for the third time (10).

The Situation.

The Boston Marine Ins. Co. on January 6, 1885, paid Mr. O'Brien a total loss of one half of the ship A. J., and such payment made the Ins. Co. *owner* of that one half.

2 Phil. on Ins., p. 397 (5th ed.), § 1723: "A mere payment "of a loss whether partial or total gives the insurers an equitable "title to what may be afterwards recovered from other parties "account of the loss.

"The effect of the payment of a loss is equivalent, in this "respect, to that of an abandonment."

Adopted in Hall *vs.* R. R. Co., 13 Wall, 367.

§ 1711: "All claims against third parties on account of negli- "gence or agency occasioning the damage to the subject or "destruction of it by a peril insured against *are assigned to* "*the underwriter* by an abondonment, so far as the subject is "covered by the policy," and the author specifies the exact case in hand:

"As, a claim against the owners of another vessel for damage "by collision with the one insured."

Rogers vs. Hosack, 18 Wend., 319, C. of Errors, Cowen, *J.* (p. 331):

"All the authorities are that the assignment becomes absolute "from the time of the abandonment. It was not too strongly "put upon the argument. *The deed of a man's farm could* "*not operate more clearly to change the legal right.*"

Comegys vs. Vasse, 1 Peters, 193. Story, *J.* (214):

"The law gives to the effect of abandonment when accepted "all the effects which the most accurately drawn assignment "could accomplish."

The Potomac, 105 U. S., 630, Gray, *J.* (634): "But upon

" familiar principles, often recognized by this Court, *the insurer* " *acquires by such payment corresponding right in any dam-* " *ages to be recovered by the assured against the wrongdoer*, or " other party responsible for the loss."

Mobile, Etc., R. R. Co. vs. Jurey, 111 U. S., 584, Woods, *J.* (594) : " The payment of a total loss by the insurer " works an equitable assignment to him of the property, *and* " *all the remedies which the insured had against the carrier for* " *the recovery of its value.*"

The Remedies of the Ins. Co.

The insurer has the right to bring suit **in the name of the insured** for the injury.

It was so held in **The Monticello,** 17 How., 152, where the insured was paid his loss by the insurance company *before the libel was filed* (p. 424), and this law was followed in

Fritz *vs.* Bull, 12 How., 466.
Newall *vs.* Norton, 3 Wall, 257.

In **Gails vs. Hamilton,** 11 Penn. St., 515, cited and quoted from in Mobile, Etc., R.R. *vs.* Jurey (111 U. S., 594), the Court said : "A shipper who has received from the insurer **the** " **part** of the loss insured against, may sue the carrier " * * * *not only in his own right*, for the unpaid balance " due to himself, **but as trustee** for what has been paid by " the insurer."

When, therefore, it appeared that the respondent had paid over to the insurance company the part of the recovery from the Thirlmere, which belonged to it, it further appeared by *the law of the contract of insurance*, that the respondent never recovered that part for himself, and that *his name was used* by the insurance company for their one-half claim against the Thirlmere.

Yet on these facts the respondent, who was *only half owner*, and had collected only *half* the Thirlmere money *for his own account*, and had paid over to the Ins. Co. their half long before this suit was brought, has been held liable as if he had collected and kept it all (see Ans., fol. 63).

Is this ADMIRALTY justice?

INTEREST.

Respondent assigns as error the allowance of interest (3d Ass., 279).

Libellants sued for £1,617 4s 3d, worth $7,870.16 and interest from March 17, 1885 (34). The German lawyers, opinion is dated March 14, 1885 (155), and Wirtz testified (145) that libellants London agents wrote to him on March 16, 1885, that they were arranging to pay the bond. Richards, their London Average Adjuster, on May 31, 1886, stated their claim at £1,376/7/0.

The District Court (273) fixed the libellants' claim at $6,091.73 (*i. e.*, about £1,200) and allowed interest from April 2, 1886.

The libellants' claim (if they have any) was **unliquidated** until the decree of July 12, 1894, and the District Judge recognized thus when he said in his opinion (234): "The rules "of general average being somewhat different in this country "from those of England, if the parties are dissatisfied with the "adjustment made in London, a reference may be taken *to ascertain the proper amount* according to our law."

Smith *vs.* Velie, 60 N. Y., 111.
McMasters *vs.* State, 108 N. Y., 557.

The Admiralty Jurisdiction.

Respondent's third exception (58) raises the question whether the libel presents a case of **admiralty** jurisdiction.

It was not considered by the District Judge.

The Admiralty Rules of the Supreme Court have the force of law.

Bailey vs. Sundberg, 49 F. R., 585 (C. C. of Ap.), Wallace, *J.*: "The rule has the force of a law of Congress."

Rule 18 was promulgated Dec. Term, 1844 (3 How. vii) and superseded all prior decisions; among others, Sheppard *vs.* Taylor, 5 Peters, 707, decided in 1831, *if it conflicted.*

In **Snow vs. 180 Tons Iron,** 11 F. R., 517, the remedy to enforce a bottomry against *proceeds* is pointed out; and it must be read in connection with Rule 23 of the Admiralty Rules, which requires, "if the libel is *in rem*" (it shall state) "that "the property is WITHIN THE DISTRICT."

Of course the jurisdiction *in rem* depends upon possession of the *res* and the *allegation* of the libel must show the jurisdictional fact.

The reasons for so holding respondent liable assigned by Judge Brown are found at folio 231, and are hardly satisfactory, for the reason that no *personal* obligation of respondent *to pay the bond* ever existed and the present suit is *in personam*, **in admiralty.**

The libellants appreciated this defect in their libel and attempted to evade it, for at folio 21 they set forth their conception of their complaint as " in a cause of action civil and mari-
" time *of the kind and nature hereinafter more fully de-*
" *scribed.*"

Respondent had excepted to the 2d libel (6. See exception 14) on the ground that it does not state the nature of the said " action," and this exception was overruled (see order 18).

Respondent again excepted (57) to the 4th libel, specifying the same objection and indicating the 23d Admiralty Rule, as the one violated.

The **Ann C. Pratt** (1853), 1 Curtis C. C., 351, Curtis, *J.*: " In " my judgment, he who loans money on bottomry, **makes a** " **contract which is to be followed out through** " **all its remedies AS SUCH**; and when it proves to be " voidable for fraud, and is avoided, he cannot treat it as a " simple loan, secured by a maritime lien, *and thus charge it* " *on the property which he failed to obtain a right to* by the " only contract which was made.

" In accordance with this is the **18th** rule of Practice in the " Admiralty, prescribed by the Supreme Court: 'In all suits on " 'bottomry-bonds, properly so called, the suit shall be *in* " '*rem only* **against the property hypothecated,** " '**or the proceeds of the property,** in whosesoever " 'hands the same may be found, unless the master has, without " 'authority, given the bottomry bond; or by his fraud or " 'misconduct, has avoided the same, or has subtracted the " 'property, or *unless the owner has, by his own misconduct* " '*or wrong, lost or subtracted the property, in which latter* " '*case the suit may be* **in personam** *against the wrong-* " '*doer.*' "*

---

* I quote the *entire* rule.

"I apprehend that this points to the **only** remedy which the "lender has when the bond is void for the fraud of the master."

The above quoted rule defines the extent of *Admirally* jurisdiction to enforce the bottomry-bond.

It must be *in rem* against the property or proceeds except in the *one case specified*, where the owner may be sued *in personam.*

See the Corsair, 145 U. S., 335. No misconduct of the re-respondent is alleged, and the District Court had no jurisdiction **to enforce the bottomry-bond in personam.**

The Further Proofs.

On his appeal to this Court, the respondent claims the right to offer the stipulation of libellants, as to their appearance in the Thirlmere litigation, in evidence, and bases this right upon the following **laws,** and contends that Rule 7 of the Admiralty Rules of the U. S. Circuit Court of Appeals for the Second Circuit, so faras it is in conflict with those **laws,** is void.

Section 11 of Chapter 517 of the Acts of 1891 contains this paragraph:

"And all provisions of law **now in force** regulating the "*methods and system* of review through appeals or writs of "errors **shall regulate the methods and system** "of appeals and writs of error provided for in this Act **in** " **respect of the Circuit Court of Appeals."**

Nota Bene.—At the time that Act was passed, on an appeal from the **District** Court, the only system **" now in force,"** which regulated those appeals, was the system applicable to an appeal to the **Circuit** Court, for there was no appeal from the District Court in Admiralty, *in instance causes*, to the Supreme Court.

A Judge of the Circuit Court of Appeals with an Admiralty appeal from the *District* Court before him, and reading the statute above quoted, that "all provisions of law **now in** "**force** * * * **shall regulate** the methods and sys-"of appeals," who is desirous of applying that law to the case, would inform himself *what were the methods in force when that act was passed*, and having found that out, would say that he was bound to apply those methods, and would also say that he

had no right to apply any other methods or to *change* those methods or to *curtail* those methods, and his one duty would be satisfied when he had found out and applied those methods.

WHAT WERE THE METHODS IN FORCE?

In the **Charles Morgan**, 115 U. S., 75, the Supreme Court of the United States, said:

"In the Lucille, 19 Wall., 74, it was **decided**:

> **Nota Bene.** "**Decided**" means that it was conclusively adjudicated and with as much binding force as if a statute of the United States declared it.

"that an appeal in admiralty from the District Court to the "Circuit Court has the effect to supersede and vacate the de- "cree from which it was taken. **A new trial; complete- "ly and entirely new with other testimony** and "other pleadings if necessary, **or if asked for** is contem- "plated, a trial in which the judgment of the Court below is re- "garded as though it had never been rendered."

> **Nota Bene.** "*Completely and entirely new*" does not mean partially or in *some* degree, new, and there is no impropriety in saying that the foregoing decision of the Supreme Court is as binding on the Judges of this Court as on any other citizens of the United States.

The right is further secured by statutory enactments, as follows:

> U. S. Rev. Stat., § 862:
>
> "The mode of proof in causes of equity and of admiralty "and maritime jurisdiction **shall** be according to rules "**now** or hereafter prescribed by the Supreme Court." *

The rule of the Supreme Court "**now in force**" referred to in the Revised Statutes regulating admiralty was Rule 50 and it is *still* in force and is as follows:

> "When oral evidence shall be taken down by the clerk "of the District Court pursuant to the above mentioned "section of the Act of Congress"—
>
> **Note**: The act referred to is specified in Rule 49, as §30 of the Act of September 24th, 1789 (see 1st Statutes at Large, 89), which provided for the personal attendance of witnesses on the trial of all admiralty appeals in the Circuit Court; see the Samuel 1 Wheaton, 16,

" and shall be transmitted to the Circuit Court, the same " **may** be used in evidence on the appeal, **saving to** " **each party the right to take the deposi-** " **tions of the same witnesses**, or either of them, " *if he should so elect.*"

LASTLY.—Respondent has not waived his objection to the jurisdiction of the District Court by appealing to the Circuit Court of Appeals, rather than to the Supreme Court direct.

As pointed out in **United States vs. Jahn**, 155 U. S., 109, this Court, if it does not decide the case in respondent's favor on the merits, should certify the question of jurisdiction to the Supreme Court; and respondent hereby asks that it be done.

January 26, 1895.

Respectfully submitted.

GEO. A. BLACK,
Advocate for Resp't,
44 Pine st., New York.

No. 266. 40.

Brief of Chubb for Appellant.

Filed Apr. 1, 1897.

Supreme Court of the United States.

Office Supreme Court, U. S.
FILED
APR 1 1897
JAMES H. MCKENNEY,
CLERK

OCTOBER TERM, 1896,
No. 266.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MARLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,
Libellants,

vs.

EDWARD E. O'BRIEN,
Respondent.

BRIEF FOR RESPONDENT.

SIDNEY CHUBB,
of Counsel.

The Evening Post Job Printing House, New York.

Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 266. (15,881.)

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL and ALFRED NAYLOR,
Libellants,

vs.

EDWARD E. O'BRIEN,
Respondent.

35 F. R., 779.
59 lb., 621.
67 lb., 605.

BRIEF FOR THE RESPONDENT.

Statement.

The case comes to this Court on *certiorari* to review a decree of the United States Circuit Court of Appeals for the Second Circuit, which reversed a final decree of the District Court for the Southern District of New York in favor of the libellants *Miller et al.* (Gibbs & Co.), for $9,598.94.

On July 15, 1884, the American ship *Andrew Johnson*, belonging to the respondent Edward E. O'Brien, of Thomaston, Maine, sailed from Caleta Buena to Hamburg, having on board a full cargo of 19,943 bags of nitrate of soda owned by the libellants, Gibbs & Co., of Valparaiso, and consigned to their agents, Antony Gibbs & Sons, of London.

On August 4, 1884, the *Andrew Johnson* put into Callao, Peru, in distress, and was there repaired at considerable expense, and reladen with about three-fifths (11,494 bags) of her original cargo, the balance (8,449 bags) being, pursuant to surveyors' recommendations, laden on the British bark *Mary J. Leslie*.

To liquidate the expenses so incurred at the port of distress the master of the *Andrew Johnson*, Captain James H. Killeran, borrowed upon bottomry and respondentia from Grace Brothers & Co., of Callao, the sum of £2,212 5s. 9d., Stg., at a maritime interest or bottomry premium thereon of 17½ per cent., making an aggregate total of £2,599 8s. 9d. Sterling, for the payment of which he executed the bottomry and respondentia bond annexed to the libel as Exhibit A.

In September, 1884, the *Andrew Johnson* and the *Mary J. Leslie* left Callao for Hamburg, where the *Mary J. Leslie* arrived on February 5th, 1885. The *Andrew Johnson* and her cargo became a "total loss" (4th Libel, fol. 11) by collision with the British ship *Thirlmere*, in the South Atlantic, her captain and the survivors of the crew being landed at Pernambuco by the *Thirlmere*.

Upon the *Mary J. Leslie's* arrival at Hamburg, Messrs. Baring Brothers & Co., of London, acting on behalf of the holders of the bottomry and respondentia bond, claimed its payment, and the consignees of the cargo, Messrs Antony Gibbs & Sons, doubting their obligation to pay this claim, obtained from Messrs. Baring Brothers & Co., on February 11, 1885, the release of the cargo in consideration of their (Gibbs) written undertaking to pay whatever proportion of the said bond may be found to be legally due from the cargo by experts appointed by each of said firms.

On March 14, 1885, the said experts, Dr. Stammann and Dr. Wolffson, lawyers of Hamburg, rendered their decision to the effect that the cargo landed from the *Mary J. Leslie* was liable for the

whole amount of the bond notwithstanding the sinking of the *Andrew Johnson* and her cargo, upon the ground that the contrary conclusion "is not consistent with the real intention of the contracting parties, and that the wording referred to has originated in the not sufficiently careful use and employment of a form of bond which happened to be at hand."

Upon receipt of the arbitrator's award, the libellants' agents, on March 17, 1885, paid Messrs. Baring Brothers & Co. the full amount of the bond including the maritime premium of 17½ per cent., amounting to £2,592 7s. 9d.

During the year 1885 (fols. 85, 97) James Fisher and others, owners of the *Thirlmere*, instituted proceedings in the English High Court of Justice, Admiralty Division, against both parties to this action and against others to limit their liability for damages growing out of the said collision between the *Andrew Johnson* and the *Thirlmere*, and paid into said court the sum representing the statutory limit of their liability amounting to £13,685 7s. 2d. (fol. 85), which sum was afterwards and prior to April 2, 1888 (fol. 39), divided between the parties to this action and the master, officers and crew of the *Andrew Johnson*, the aggregate of whose allowed claim exceeded the fund in court by more than £4,000 (fols. 87, 45).

More than a year after the distribution of the *Thirlmere* dividend, and on July 20, 1887, the first libel herein was filed. This libel alleges that the *Andrew Johnson* and her freight had become a "total loss," and made no mention of the *Thirlmere* dividend. On August 4, 1887, the respondent filed exceptions to the first libel in that (1) it did not state the nature of the action (as required by the rules), and (2) that it did not state a cause of action against the respondent.

Said exceptions came on to be heard before the Hon. Addison Brown, Judge of said District Court, on the 10th day of April, 1888, who rendered his

decision on the 6th day of June, 1888, and on the 27th day of June, 1888, an order was duly made and entered overruling the first and sustaining the second of said exceptions, and ordering that, unless said libel be amended, the respondent have a final decree against the libellants dismissing their libel, with costs. On July 28, 1888, libellants filed an amended libel (No. 2), the amendment consisting in the addition to the fourth article of the libel of the allegation that the condition and character of the ship *Andrew Johnson* was such that she could not by repairs be made fit to carry her cargo to the port of destination, nor be fitted to carry any portion thereof forward except by making heavy repairs; the transshipment of 8,449 bags of cargo on the *Mary J. Leslie*, and that in place of transshipping the remaining portion of said cargo to other bottoms and forwarding the same to its destination, which would have been the proper course to pursue, the respondent, for his own advantage, and not for the advantage of the libellants, elected to carry forward the said remainder of the cargo, and to that end discharged and warehoused a large portion of said cargo and made extensive repairs to the ship.

And further, in alleging in the sixth article the issue by the *Mary J. Leslie* of her bill of lading, a copy of which was annexed to such amended libel.

On September 27, 1888, respondent filed exceptions to said amended libel in that (1) it did not state the nature of the action; (2) that it did not state a cause of action against the respondent by reason of the absence of any averment of the performance of a condition precedent to the validity of any bottomry and respondentia to wit, *communication had by the Master before execution thereof with the respective owners of the cargo;* and (3) that it did not state a cause of action against the respondent.

Said exceptions came on to be heard before the said District Judge on the 28th day of November, 1888, and on the 5th day of December, 1888, an order was made and entered overruling the first and sec-

ond of said exceptions and sustaining the third exception, and ordering that unless the libel be further amended that the respondent have a final decree against the libellants, dismissing the libel, with costs.

On January 4, 1889, libellants filed a second amended libel (No. 3), the amendment consisting in the addition to the fifth article of an allegation that the respondent supplied funds to the Master or caused funds to be supplied by Grace Brothers & Co., of Lima, Peru, to defray the expenses of repairs, &c., and an allegation that the libellants, not being fully advised of the circumstances, and believing that the bond was properly and necessarily issued, assented; an amendment of the sixth article alleging that the libellants believed that they were in law bound to make payment of the bond to redeem their cargo; and the addition to the seventh article of an allegation that the ship *Andrew Johnson* was of the value exceeding $15,000 at the time in question. On January 28, 1889, respondent filed exceptions to said libel in that (1) it did not state the nature of said action; (2) that it was ambiguous and uncertain in averring in article 5th that the respondent supplied funds to the master or caused funds to be supplied by Grace Brothers & Co., and thereafter averring that Grace Brothers & Co. advanced said sum to the master; (3) that it did not state a cause of action within the admiralty and maritime jurisdiction of the Court against respondent, and (4) that it did not state a cause of action against respondent.

On October 24, 1890, on motion of libellants and after argument by counsel, an order was made allowing the libellants to further amend their libel by adding to the sixth article thereof the following: "The said loss of the said ship *Andrew Johnson* "and her cargo on the said voyage from Callao to "Hamburg was due to her collision with the British "ship *Thirlmere*, and it appearing that said colli- "sion was due solely to the fault of those navigat-

"ing the said ship *Thirlmere*, the respondent or his "privies have, through appropriate legal proceed- "ings in the courts of Great Britain, compelled the "owners of the said ship *Thirlmere* to pay on ac- "count of the loss of the said ship *Andrew Johnson* "and her freight the sum of £6,557 9s. 6d. and "have collected and received the same," and on October 28, 1890, libellants filed their amended libel (No. 4), in conformity with said order.

On June 22, 1891, respondent filed his exceptions and answer to said amended libel (No. 4).

The said exceptions were:

(1.) That the said libel (No. 4) did not state the nature of the action as required by the twenty-third Admiralty Rule.

(2.) That it did not state a cause of action against this respondent.

(3.) That it did not state any cause of admiralty and maritime jurisdiction.

Without waiving the benefit of the foregoing exceptions the answer proceeded to admit some of the allegations of the fourth libel and to deny others.

The libel (No. 4) and the exceptions and answer of the respondent thereto appear at pages 4 to 14 of the Transcript of Record.

The cause came on to be heard before the Honorable *Addison Brown*, District Judge, on November 22, 1893, whereupon after hearing the pleadings read the Court overruled the first and third exceptions and reserved the consideration of the second until the evidence should be taken.

The advocate for the respondent thereupon moved to amend the answer by setting up two separate and additional defenses; first, to as much of the libellants' claim as arises out of the limited liability proceedings in the English Court as to the *Thirlmere*; the defense of laches on the part of the defendant in not sooner bringing that matter before the Court;

also, second, as to the same portion of the claim the defence of *res adjudicata* because passed on by the English Court.

The Court denied each of said motions and the second on the ground of want of notice to the libellants, and the respondent having duly excepted the taking of the evidence was begun, the libellants reading in evidence the depositions of ten witnesses and the respondent that of one witness and the cause was then argued by counsel, no witnesses having testified in open court.

On February 5, 1894, the District Judge rendered his decision in favor of the libellants (printed at p. 45).

Subsequently the respondent again moved upon affidavits for leave to set up the said two additional defenses, which motion came on to be heard on April 10, 1894, and was denied, and an order to that effect entered on April 19, 1894 (Record, pp. 49 to 54).

Upon the coming in and confirmation of the Commissioners' report a final decree in favor of the libellants Gibbs & Co. was entered on July 12, 1894, for $6,091.73, with interest thereon from April 2, 1886, and taxed costs, amounting in all to the sum of $9,598.94.

The respondent appealed to the United States Circuit Court of Appeals for the Second Circuit from this final decree, and the Court, held by *Wallace*, *Lacombe* and *Shipman*, *JJ.*, having heard argument by counsel, handed down, by LACOMBE, *J.*, its opinion reversing the said final decree, with costs to the respondent O'Brien in both courts (Record, pp. 58–65).

On May 6th said Circuit Court of Appeals entered its decree directing a mandate to issue to the District Court to enter a decree in conformity with its decision.

On May 7th a writ of *certiorari* was obtained herein by the libellants from the Supreme Court, and on May 8th the Circuit Court of Appeals made an order staying the issuance of a mandate under its

decree of May 6th pending the determination of the cause in the Supreme Court of the United States.

As the matter reviewed in this Court upon a writ of *certiorari* is the *decree* of the Court below, it is competent for a party to argue that such decree was correct, not only for the reasons set forth in the written decision of the Court below, but also for any other independent reasons which lead to the same result.

Such argument being competent, the sweeping terms of the mandate of this Court, after it decides a case, render it expedient to state the whole of our argument in this brief, although in our view the opinion written by Judge *Lacombe* correctly disposes of the controversy.

Point I.

The foundering of the *Andrew Johnson* with her cargo rendered the bond void.

The bond was executed in triplicate "*after careful reading*" by the master, Killeran, in the presence of two witnesses, H. G. Lester and H. M. Bromley, and of the United States Consul, H. M. Brent, and was acknowledged before the latter. It is no brief and informal draft or memorandum, but a carefully drawn document of over one thousand words, using words of limitation and other technical terms in their proper places with such precision and accuracy as to compel the conviction that it was drawn by a lawyer. Omitting a few immaterial words and claims it reads as follows:

> "Know all men by these presents that I,
> "James H. Killeran, master mariner and
> "commander of the ship *Andrew Johnson* of
> "Thomaston, Maine, of the measurement,

" &c.; now lying in the port of Callao, am held " and firmly bound to Messrs. Grace Bros. & " Co.; of &c.; in the penal sum of * * * " £2,212 to be paid to the said Grace Bros. & " Co., or any of them, &c.

" For which payment to be well and faith- " fully made, I bind myself, my heirs, &c., " and also the hull, boats, tackle, apparel and " furniture of the said vessel, and her cargo " of nitrate of soda, including about 1,200 of " nitrate of soda transshipped on board the " British bark *Mary J. Leslie* of &c., and " the freight to be earned and become pay- " able in respect thereof, firmly by these pres- " ents.

" Sealed, &c.

" Dated, &c.

" Whereas, the said vessel lately sailed, " &c. * * * sprang a leak * * * bore " up to Callao * * * was duly surveyed, " * * * and certain repairs were recom- " mended to be done to enable the said vessel " to continue the voyage with safety, and also " to tranship to another vessel about 1,200 " tons of the cargo laden on board the afore- " said *Andrew Johnson* in order to enable her " to proceed on her voyage with perfect " safety.

" And, whereas, all necessary repairs and " supplies have been made to the said vessel " and the said portion of cargo transshipped to " the *Mary J. Leslie* to enable her to prose- " cute her said voyage, and she is now in a " seaworthy condition and ready to proceed to " sea, but the said James H. Killeran having " unavoidably incurred certain debts for such " repairs and other necessary and lawful mat- " ters and things relating to his said vessel " which he is totally unable to defray and " make good save and except upon the security " of the bottom of his said vessel and her cargo

" and freight, hath been necessitated to raise " the sum of * * * £2,212 for the pay- " ment of the debts incurred as aforesaid and " to enable the said vessel to proceed to sea on " the said intended voyage and which sum " the said master has been unable to obtain on " his own credit or that of the owners of the " said vessel or in any other way than by bot- " tomry and hypothecation of the said ves- " sel, her boats, apparel, cargo and freight;

" And whereas, the said Grace Bros. & Co., " have, at the request of the above bounden " James H. Killeran, agreed to lend and ad- " vance to him the sum of * * * £2,212 " * * * for the purpose aforesaid upon his " executing this present bond or obligation " and hypothecation of the said vessel, " her boats and apparel, and her cargo, in- " cluding that portion of her cargo trans- " shipped to the *Mary J. Leslie* and the " freight to be earned and become payable in " respect of the said voyage, and the said " Grace Bros. & Co., are contented to stand " to and bear the risk, hazard and adventure " thereof, upon the hull, body or keel of the " said vessel *Andrew Johnson*, her boats, " tackle, apparel and furniture, together with " the cargo laden on board as aforesaid, and " the freight to be earned and become pay- " able as aforesaid, and for securing the re- " payment of the said sum * * * the loan " whereof is hereby acknowledged, he the " said James H. Killeran, doth by these pres- " ents mortgage, hypothecate and charge the " said vessel, her boats, tackle, apparel and " furniture and her cargo, including that por- " tion of the cargo transshipped to the *Mary* " *J. Leslie* and the freight to be earned and " become payable in respect of the said voy- " age, unto the said Grace Bros. & Co., their " executors, &c.

"Now the condition of this obligation is
" such that if the said vessel shall forthwith
" set sail from Calloa aforesaid, and without
" unnecessary delay or deviation proceed on
" her intended voyage to Hamburg, and if
" the above bounden James H. Killeran shall
" and do within the space of five days next
" after the arrival of the vessel at her final
" port of destination, and before commenc-
" ing to discharge the cargo free of any aver-
" age whatever at the then current rate of
" exchange on London, well and truly pay or
" cause to be paid unto the said Grace Bros.
" & Co , &c., upon the present obligation the
" sum of £2,212, &c., being the principal
" money of this obligation and the further
" sum of £387 for the maritime interests or
" bottomry premium thereon at the rate of
" seventeen pounds, ten per centum, making
" together £2,599, &c., &c.

"Or, if during said voyage an *utter loss of*
" *the said vessel* by fire, enemies, pirates, the
" perils of the sea or navigation or any other
" casualty, shall unavoidably happen,&c.,&c.,
" then, and in either of the said cases, this
" obligation shall be void, or otherwise to be
" and remain in full force and virtue."

It will be observed that this elaborate and carefully worded document sets forth all the essential circumstances under which the contract was made between Grace Bros. & Co. and the master, as fully as the record in this case does. The disaster, the seeking a port of refuge, the survey, the repairs to the ship, the handling of the cargo, and the necessity of lightening the *Andrew Johnson* to enable her to complete her voyage, the transshipment of about 1,200 tons of cargo to the *Mary J. Leslie*, the inability of the master to raise the money to pay expenses—all these are fully disclosed by the instrument itself, and the other evidence in the case adds nothing to our in-

formation as to the situation existing when the bargain was made. The bond is clearly expressed and free from any ambiguity. The words "said vessel," whenever they are used, from the beginning to the end of the bond, refer grammatically and logically to the *Andrew Johnson* and to her only.

The libellants concede that unless they were *obligated* to pay the bond upon the arrival of their cargo *ex Mary J. Leslie* at Hamburg they have no claim against us.

They contend that this obligation is arrived at by each of two independent lines of reasoning:

(1.) That the bond was payable unless there was an "*utter loss*" of *both* vessels and their cargoes; and that, therefore, as the transshipped cargo did arrive and was, in effect, "salvage" from the *Andrew Johnson*, it was liable for the face of the bond.

(2.) That there was not an "*utter loss*" of *either* of the two vessels or their cargoes, since one of the vessels, with her cargo, arrived *in specie*, while the other vessel was not an "*utter loss*," because upon her foundering a cause of action arose against the *Thirlmere* upon which the respondent collected a dividend (upon his proving to the High Court of Justice in England that before bringing his action *he had sustained an* "*utter loss*" of his vessel and her freight by the collision).

Before considering these two arguments or theories of the case, we write to point out *in limine* that in presenting them the libellants occupy inconsistent positions.

Under their first theory they claim that the question is to be determined according to the law of the place of final performance of the bottomry contract, and they have therefore attempted to prove as a fact, by expert witnesses, the law prevailing at Hamburg.

In taking such proof the libellants were at least logical and it might be that *if* the case in all its

parts is to be governed by the law of the port of destination and *if* all the material facts were submitted to the experts and *if* in arriving at their opinion they considered only the material facts so submitted and refrained from considering matters *dehors* the record, the conclusion to be drawn from such evidence would favor the libellants unless this Court should be with us upon the plea of *res adjudicata* because of the prior passing upon the libellants' claims by the English Court.

In urging their second theory, however, the libellants make no mention of the Hamburg law.

We submit that if the meaning of the defeasance clause, which is set forth in their first theory, is to be decided by German law, the meaning of the same words which is set forth in their second theory is equally to be decided by German law, and since no questions to that end were propounded by the libellants to their experts, although they were examined subsequently to the collection of the *Thirlmere* dividend, the natural inference is that such questions were not propounded because the libellants' counsel knew that the answers would be unfavorable to his clients; hence it results, in our judgment, that the libellants having in their brief urged their first theory, cannot in this state of the record herein *also* urge their second theory.

In considering the libellant's first theory it is proper to draw the Court's attention to the circumstances surrounding the Hamburg arbitration and to the testimony of the two Hamburg lawyers adduced in support of this theory.

As the bondholders' agents claimed its payment and the cargo owners' agents doubted its validity (fol. 40), it was agreed between them that the cargo should be instantly released and the question of liability should be decided by two Hamburg lawyers, one to be named by each side. This was done, and the lawyers named were Dr. Stammann and Dr. Wolffson. The testimony is very meager as to the manner in which the submission was made.

Dr. Wolffson testified (fol. 51):

"I *presume* that the bond annexed was "submitted to me at the time and that the "fact of the loss of the *Andrew Johnson* was "made known to me. I presume that I "must also at the time have seen the annexed "bill of lading (same is annexed to amended "libel)."

Dr. Stammann testified (fol. 54) that the bottomry bond was submitted and the arbitration given as requested:

"I do not remember whether the *loss* of "the *Andrew Johnson* was made known to "me *as this was not relevant to the contents* "*of our judgment.* I do not remember "whether I have ever seen the annexed bil? "of lading (same is annexed to amended "libel), not having been necessary for the "giving of the opinion or judgment."

No other facts are testified to as to the manner of submission. Two other lawyers, former partners of the libellants' arbitrator, Dr. Stammann, testified that they agreed with the arbitrators' decision, which was as follows:

HAMBURG, 14th March, 1885.

"HUGO WIRTZ, Esq.,
"Messrs. I. Berenberg, Gossler & Co.

"We formulate the question which you, "in the names of Messrs. Antony Gibbs & "Sons and Messrs. Baring Brothers & Co., "have submitted to our judgment, as "follows:

"Whether the portion of the cargo of "nitrate of soda of the *Andrew Johnson* "brought home per *Mary J. Leslie*, is liable "for the whole amount of the bottomry "bond, which was signed in Callao, and "whether, consequently, the receiver of this "portion of the cargo has to pay the whole

" of the bottomry bond, provided the value of " this portion of the cargo is not less than " the amount of the bottomry debt?

" This question we must answer in the " affirmative, because according to the law " here, ship, freight and cargo of the *Andrew* " *Johnson*, as well as the portion of the cargo " which was transshipped into the *Mary J.* " *Leslie*, are jointly liable for the whole " amount raised on bottomry at Callao, and, " therefore, the *Andrew Johnson* and her " cargo having become a total loss, the holder " of the bottomry bond can come upon that " portion of the cargo which was shipped by " the *Mary J. Leslie* for the whole amount " of his claim.

" Some doubt might be raised as to " whether, according to the wording of the " bottomry bond, the money was not lent or " appeared to be lent contingent upon the " safety of the *Andrew Johnson*, and becom- " ing due only after her arrival at her port " of destination, but becoming null and void " in the event of her non-arrival. We are of " opinion, however, that this interpretation is " not consistent with the real intention of " the contracting parties, and that the word- " ing referred to has originated in the not " sufficiently careful use and employment of " a form of bond which happened to be at " hand. This seems the less doubtful to us for " this reason, that if the bottomry bond were " interpreted in this manner, the cargo of the " *Mary J. Leslie* would be entirely liberated, " after the loss of the *Andrew Johnson* " occurred, and would not even bear a por- " tion of the bottomry debt, which neverthe- " less has arisen out of a case of general " average. Manifestly this cannot have been " the intention of the parties interested.

" Yours truly,

" (Signed) L. Otto Stammann.

" I. Wolffson."

The foundation of the libellants' claim is, they contend, that in order to obtain their cargo they had to take up the bottomry bond. There were no court proceedings, and, as we were not parties to the arbitration, it can not, of course, be binding upon us. The utmost effect therefore that the libellants can claim for the Hamburg evidence is that it proves that *if* there had been a suit at Hamburg the bond would have been unheld.

To this we have several complete answers:

(1) Material facts which would have compelled a contrary concluson were not stated to the German lawyers.

Article 504 of the German Code obliges the master "to take every possible care that those interested in "the cargo are speedily informed of such occurrence "and of the measures thereby rendered necessary" (fol. 63).

The fifth article of the fourth and final libel shows that the master of the *Andrew Johnson* failed to perform this obligation, and yet the arbitrators were not informed of this. Had they been so informed they must have held the bond void.

(2) One of the arbitrators testified (fol. 51) that analogous cases were not known to him and all the experts agreed that "in my opinion no law prevail-"ing at Hamburg prohibits parties to a bottomry "and respondentia bond from making an agreement "that if the vessel hypothecated by it be lost by a "peril of the sea, the bond shall thereby become "null and void."

The Court below held that such an agreement was made by us and that the bond was void.

Both of these answers to the libellants' contention could have been made, even though the arbitrators had followed the advice given by a great jurist to judges of inferior jurisdiction, to state their conclusions but never their reasons, and had closed

their decision at the words "This question we must answer in the affirmative."

They went further, however, and showed that they based their conclusion upon their assumption, not upon the point now urged by the libellants, that the *Leslie's* cargo was "salvage," but that the "wording" of the contract did not express the intention of the parties to it, but arose from "the not "sufficiently careful use and employment of a form "of bond which happened to be at hand."

To the refutation of this gratuitous assumption concerning the intention of the parties made by Judge *Lacombe* in his opinion (pp. 63 and 4), we need only add that this award is proved to have been sent to the libellants or to their agents upwards of eight years before the trial in the District Court, so that they had ample time in which to investigate the suggestion of a scrivenor's error, and to introduce the necessary pleadings and proof had it been founded upon fact.

Having based their decision upon an assumption utterly without foundation, the arbitrators attempt to support it by an additional argument in these words:

> "This seems the less doubtful to us for this "reason, that if the bottomry bond were in- "terpreted in this manner, the cargo of the "*Mary J. Leslie* would be entirely liberated "after the loss of the *Andrew Johnson* oc- "curred, and would not even bear a portion "of the bottomry debt which nevertheless "has arisen out of a case of general average. "Manifestly this cannot been the intention "of the parties interested."

This involves the ridiculous assumption that one of the parties to a contract has not intended to make a stipulation which it is manifestly to his interest to

make, and for the granting of which the opposing party has an opportunity to compensate himself (and which it must conclusively be presumed that he has from the terms of the instrument itself) in fixing the rate of premium which he is to receive for agreeing to such stipulation.

It was for the master's interest to obtain a stipulation that the bond should fail if the vessel should sink, since the vessel and freight are the primary and the cargo the secondary liabilities under the bond, it was also his duty to make, if he could, as good a bargain for his cargo as he did for his vessel, and the master having carved out the risk which he wished the lender to assume, the latter fixed the premium in accordance with his risk.

The libellants realizing no doubt that there is a failure of proof as to their claim that they were *compelled* to pay the bond, seek to "mend their hold" and contend that upon a proper construction of the bond according to our law they have a cause of action against us for the various reasons urged in their brief.

We submit that they cannot thus mend their hold but must stand or fall upon the proof as to the German law.

Leaving this objection for consideration by the Court we proceed to state our reasons for contending that in any event the libellants' arguments are unsound.

The libellants claim that the defeasance clause should be interpreted as if it read "or if during said voyage an utter loss of *both of said vessels* * * * should unavoidably happen."

See their brief on application for *certiorari*, page 10, "for the words 'said vessel' in the defeasance "clause relate clumsily perhaps, but clearly, to either "the *Andrew Johnson* or the *Mary J. Leslie*."

Since the words of the defeasance clause are plain and unambiguous of themselves and since it is a cardinal rule that construction cannot begin until and unless there is some ambiguity in the instrument itself, the libellants are compelled to seek such alleged ambiguity in other parts of the bond in order to provide themselves with a starting point for their interpretation.

> "Indeed, the very idea and purpose of con-
> "struction imply a previous uncertainty as to
> "the meaning of the contract; for where this
> "is clear and unambiguous there is no room
> "for construction and nothing for construc-
> "tion to do. A court would not, by con-
> "struction of a contract, defeat the express
> "stipulations of the parties."
>
> *2 Parsons on Contracts* (8th Ed.), *617*.
> See also *Dumont* v. *U. S.*, *98 U. S.*, *142*.

Their contention is that the words "the said vessel" earlier in the defeasance clause must relate to both vessels, because it could not have been contemplated that, in the event of the arrival of the *Mary J. Leslie* in Hamberg earlier than the *Andrew Johnson*, she should lie in Hamburg before commencing to discharge cargo.

This is pure surmise. Parties to a maritime contract are not bound to discuss in it all possible incidents and outcomes of the effects of the wind and waives under penalty of having plain terms treated as ambiguous.

They may not have considered this contingency at all. On the other hand they may have considered it practically certain on such a voyage so large a vessel as the *Andrew Johnson* would have arrived earlier than a small one like the *Mary J. Leslie* if she arrived at all, and may therefore have thought it unnecessary to stipulate further on this point.

Of course, if the parties to the bond intended

"said vessel" where first used in the defeasance clause to mean "both of said vessels," they may also have intended it to mean the same where last used in said clause, but of this there is not a scintilla of proof.

The libellant's contention on this head in reality consists of two propositions:

(1.) That the defeasance clause is ambiguous.

(2.) That such ambiguity must upon consideration of the whole instrument be solved in the sense contended for by them.

We submit, however, that even if the defeasance clause were ambiguous, other portions of the bond furnish a conclusive negative to the second proposition.

Upon examination of the bond it will be seen that wherever the *extent* of the lender's security is mentioned the *Mary J. Leslie's* cargo is *expressly* included by means of the words cargo "*transshipped*," but that wherever the *risk* which the lender is to run is mentioned the *Leslie's* cargo is not named at all.

The two places in a respondentia bond where by custom the *risk* is defined, are that portion of the recitals which relates to the lender, and the condition or defeasance clause.

The latter, we contend, even when taken by itself, refers only to the *Andrew Johnson*, but if there be room for doubt on the point such doubt is removed when we find in the recital clause which deals with Grace & Company, the lenders, that "the said Grace "Brothers & Co. are contented to stand to and bear "the risk, hazard and adventure thereof upon the "hull, body or keel of the said vessel *Andrew John-*"*son*, her boats, tackle, apparel and furniture, to-"gether with the cargo laden on board as aforesaid "and the freight to be earned and become payable "as aforesaid."

In this connection we read in the libellants' brief (p. 11) in support of their application for *certiorari:*

> " It is significant that since the (District) " Court so interpreted the bond, both the " master and the owner of the *Andrew John-* " *son* have been called as witnesses and " neither of them has suggested that there " was any intention to make the bond depend " upon the arrival of the *Andrew Johnson* at " Hamburg."

A witness's function is simply to answer truly such questions as are put to him by the counsel for the respective parties. As we do not now, and did not then, believe such testimony to be relevant, competent nor material, we could not properly nor consistently cross-examine as to it. As the libellants' counsel seems to think otherwise and as he called both the witnesses he names, and being the plaintiff the *onus probandi* was on him, why did he not ask the appropriate questions?

The reasonable and customary inference is that he refrained from so doing because the answers thereto would have told against his clients.

The libellants' second contention is that only by upholding the bond can due effect be given to the intention of the parties, which was that whatever got to Hamburg should be held to pay the bond.

This again is not only mere surmise and conjecture as to the parties' intention but is a surmise against the natural possibilities and probabilities of the case.

Their argument is that because the *Mary J. Leslie's* cargo is named in the bond and because the security without her cargo was ample, the naming of her cargo shows an intention to make it liable although the *Andrew Johnson* were lost.

This leaves out of account however the effect of the perils of the seas which is the excuse or cause of the bottomry premium.

The ship and freight money are the primary liabilities in cases of bottomry and the cargo merely a secondary liability. If there were no exposure to perils of the seas the ship alone ($60,000) or the freight money alone ($20,000) were each more than sufficient to satisfy the bond without joining the cargo; the only object therefore of covering any part of the cargo must have been to make good a possible deficiency caused by sea perils reducing the value of ship and freight below the face of the bond; if, however, such sea perils were encountered as to reduce the ship and freight of the *Andrew Johnson* from $80,000 to less than $8,000, it is absolutely certain that the same sea perils would also affect her cargo enormously (since otherwise the freight due from it would itself discharge the bond twice over), and it therefore was prudent to include the *Mary J. Leslie* cargo as additional secondary security to make good any possible deficiency of the other. A natural and reasonable explanation of the naming of the *Leslie's* cargo in the bond being thus given and such course being in accordance with the custom, which is to include all a vessel's cargo or none in such bonds, there is no excuse or cause for drawing the inference claimed by the libellants.

Moreover, the libellants' inferences are strongly negatived by the inferences to be drawn from the maritime premium exacted.

Seventeen and one-half per cent. bottomry premium (which is virtually insurance against total loss only of both ship and cargo for the voyage), although a high rate on even a single vessel, is not unprecedented; such a rate, however, on total loss of both of two vessels or, what is the same thing, of cargo by both of two vessels, is so unheard of and extortionate, that an intention to pay it could only be credited upon the direct testimony of trustworthy witnesses, and cannot otherwise be inferred as the deliberate intention of any one possessed of ordinary business capacity.

The libellants discuss at great length the question of "*salvage*" in bottomry cases under the laws of various countries, but it seems to us that such discussion is irrelevant here, since the citations show at most the incidents annexed to a contract of bottomry by the codes and courts of the various countries in cases where the contract itself expressly reserves or is silent as to salvage, and they cannot, therefore, control in the case at bar where there is not only no reservation of salvage or average, but words are used expressly negativing such reservation, and where in addition there is an unusual state of facts and a peculiarly precise defeasance clause.

In other words, the European cases, like that of *Insurance Company* v. *Gossler* in this Court, discuss the incidents of a bottomry bond, "*unless the condition is otherwise.*"

It is also to be borne in mind that the Hamburg experts testified that analogous cases to the one at bar were not known to them, and also that there was nothing in the law of Germany to "prohibit "parties to a bottomry and respondentia bond "from making an agreement that if the vessel hy- "pothecated by it be lost by a peril of the sea, the "bond shall thereby become wholly null and void" (Record, fol. 55).

The libellants further argue that the *Andrew Johnson* did not become an "*utter loss*" when she went to the bottom of the sea because her going to the bottom gave her owner a chose in action against the *Thirlmere;* or as the learned counsel put it upon the trial in the district court the "chose in action is the same as the ship."

Here, again, the libellants seek to wrest the words used by the parties from their customary meaning so as to make them appear to cover their claims.

There is no rule of construction better settled than that which holds that, where words have by force of

custom in any particular business come to have a fixed and definite meaning, they shall be given such meaning in contracts appertaining to such business unless a different meaning is compelled by the context.

From time immemorial the precise collocation of words used in this bond has been employed in all bottomry contracts, and has been understood to mean the physical loss of the vessel pledged. The survival of the cause of action after the foundering of ship and cargo is a metaphysical and legal conception in which master mariners and bottomry lenders are not accustomed to deal.

> "So if parties used in a contract technical "words of the law merchant, such as aver- "age, or agio, or grace, these words could "not be wrested from their customary and "established meaning, on the ground that "the parties used them in a sense which had "never before been given to them."
>
> *2 Parsons on Contracts, 614.*

The learned counsel for the libellants had cited no case in which "utter loss" is held to mean anything but the physical loss of the vessel, even when the bond included salvage and average accustomed, which was carefully omitted in this bond and cannot now be read into it without making for the parties a contract which they declined to make.

In the words of Judge *Lacombe:*

> "But the hazard taken by the bottomry "bondholder is the physical removal of the "ship, or at most of any salvage from her. "When she goes to the bottom with all she "holds, there is an utter loss within the "meaning of the contract of bottomry and "the bond goes down with the vessel" (fol. 108).

The libellants also argue that:

The true meaning of the defeasance clause is that, in the event of the property being damaged or in part destroyed by sea perils, the bondholder's rights are limited to the value of such property as may be saved, and that he has no remedy against the master or owner of the vessel personally for the stipulated amount of the bond, a right which he would have if the property had been destroyed or diverted by the deliberate intention of the master or owner (the *Catherine*, 15 Jurist, 231, 232, Libellant's Brief, p. 15).

We submit that this construction makes the clause a mere waste of words, since it simply states the rights the parties would have had in the absence of any express stipulation under the law of the forum and under the law of the flag, and also presumptively under the laws of the place of contract and of the place of final performance.

We have been able to discover, after a somewhat extended search, but two reported cases in which the facts were sufficiently like those of the case at bar to be in the least in point—neither of them is controlling in this Court as authority, and we think we can also show that neither is persuasive as argument.

The first is the case of *The Empusa*, 5 Prob.Div.,6.

The master of the *Commerce* obtained from the agent of the *Cassa Marittima* at her port of loading a loan for which he executed the following instrument:

> " Fifteen days after arrival at the Port of
> " Antwerp or other intermediate port at which
> " shall end the voyage of my vessel denomin-
> " ated the *Commerce*, I promise to pay to the
> " order of the *Cassa Marittima* of Genoa, the
> " sum of £598 1s. 4d., value received as loan
> " on freight for the last expenses necessary to
> " the undertaking of the voyage from Phila-

"delphia to Antwerp, Belgium, on the condi-
" tions of the regulations of the *Cassa Marit-*
" *tima*, of which I have received a copy, ship
" and freight being, in accordance with such
" regulations, liable for repayment, with
" priority over every other credit."

The sum of £598 1s. 4d., was made up of the amount loaned and the premium and interest thereon.

The *Commerce* was sunk by the *Empusa* in deep water, and became, with her cargo, a total loss, whereupon the owners of the *Empusa* paid into Court £8,940 13s. 8d., their statutory limit of liability for loss of property. The claim of the owners of the *Commerce* for loss of freight was allowed at £2,088, and the *Cassa Marittima* claimed to prove against the fund in court for the sum of £598, 1s. 4d., or else to have an order that the owners of the *Commerce* pay said sum out of their award, or that they recover their *pro rata* share of the sum apportioned in respect to the loss of freight, either from the sum in court or from the owners of the *Commerce*.

The learned Judge is reported as having said on the argument that the transaction was a loan on bottomry, but his actual decision was as follows:

Sir Robert Phillimore: "This is a case for
" which there is no legal precedent, but it is
" one that is to be decided on general prin-
" ciples of equity, and I decide that the *Cassa*
" *Marittima* is entitled to receive out of the
" fund in Court applicable to the payment of
" damages for the loss of freight, the same
" proportion of the £598, 1s. 4d., as the total
" sum apportioned in respect of the loss of
" freight bears to the whole freight of the
" ship. The actual apportionment will be
" made by the register." Which was done, and the *Cassa Marittima* recovered £181, 6s. 7d.

We are unable to surmise the train of reasoning which led to this result, unless it was based upon a consideration of the terms of the British statute under which the proceedings were taken. But we submit, with confidence, that had the learned Judge been of the opinion that the instrument was a bottomry bond, and was payable notwithstanding the utter loss of the *Commerce* and her cargo and her crew, as is contended by the libellant here the *Cassa Marittima* would have received payment in full of its claim of £589, 1s. 4d.; since it appears that the owners of the *Commerce* received more than that amount in respect of their loss on freight alone, to say nothing as to their loss on hull.

It may properly be noted here that the United States Circuit Court of Appeals for the Second Circuit have decided, affirming the District Court, that these *Cassa Marittima* transactions are loans on freight.

The only other case on the point known to us is

Appleton *v.* Crowinshield, 3 Mass., 448.

Here the bond read:

> " If, therefore, the said schooner shall per-
> " form the said intended voyage or voyages,
> " and the said George, his heirs, executors or
> " administrators shall and do well and truly
> " pay, &c. * * * Or, in case said schooner
> " should be lost through perils of the sea or
> " by fire, or the enemies of the United States
> " while she is performing her said voyage or
> " voyages, then this obligation shall be void
> " and of none effect; but otherwise shall be
> " and remain in full force, strength and
> " virtue."

The schooner was captured by certain British subjects and taken into a West India port where she was condemned as lawful prize. From this sentence an appeal was taken to the Lords Commissioners of

Appeals in Great Britain, by whom the sentence was reversed; and a restoration of the vessel not being possible, the defendant was awarded full compensation for his schooner and her cargo and freight.

The Court held, in action of debt upon the bond, that an event within the condition of the bond had happened whereby the obligor is discharged from his contract although the defendant had recovered her FULL value.

S. C., 8 Mass., 430.

This was the second suit between the same parties, being assumpsit for money had and received, and a majority of the Court decided in favor of the plaintiff, partly, if not entirely, upon the construction of the treaty with Great Britain under which the award was made to the defendant by which he was FULLY compensated for all losses arising out of the capture, &c.

Sedgwick, *J.*, dissented, and his indignant protest against the decision, in what is probably one of the most elaborately argued case ever disposed of by a Massachusetts Court, is worth citing:

> "Indeed, I know no instance in which a "man can claim on principle of law a dis- "charge from a contract, according to the "stipulation of it, who can be bound on the "ground of the contract afterwards; which "is precisely what is claimed in the present "case. And if this principle is correct, as I "conceive it to be, the effect of the British "treaty is not necessary to be considered."

As the decision in the first suit on the bond (3 Mass.) is in our favor, and as the second suit turned on the construction of a treaty which is not an element in the case at bar, we submit that neither this case nor that of the *Empusa* support the libellants' contention.

It may properly be pointed out here that in the second case of Appleton *v.* Crowninshield (*supra*), it was found that the defendant had recovered *in full* for everything with interest, and the Court seems to have spelled a trust or duty of the treaty upon which they could take hold of the defendant according to well settled principles of equity jurisprudence.

Point II.

The first exception to the libel is well taken, and should have been sustained by the District Court.

Our first exception to the first and to each subsequent libel was that it did not state the nature of the action as required by the 23d Admiralty Rule of this Court.

Although a court of admiralty is said to be "elastic" and "liberal" in its practice and rulings in matters of pleadings and procedure, nevertheless, a *rule* is something to be obeyed, not evaded, and a deliberate, intentional, four times repeated evasion of one of the admiralty rules of this Court, persisted in after express objection taken by exception and oral argument had thereon, ought not to have been sanctioned by the District Court, still less ought it to have been rewarded by a decree in full, with interest before demand, and costs and disbursements.

The libel avers that it is "in a cause of action civil "and maritime of the kind and nature hereinafter "more fully described."

As the "kind and nature" are not thereinafter mentioned at all, this phrase evidently leaves it to the opposing counsel to draw his own conclusions on

the point, which conclusions are, of course, not binding on the libellants.

This is, we submit, a mere evasion of the rule, which is aimed at the libellant's pleader by requiring him to take up a position to which he must hold.

The explanation of this persistent evasion of the rule is, it seems to us, that the libellants' counsel was between the two horns of a dilemma and wished to avoid selecting either. If he averred a cause of bottomry and respondentia he exposed himself to the objection that the rules required the action to be *in rem*. If to escape this horn he took the ground which he afterwards urged upon the trial before the District Court that his clients' cause of action arose "in highest equity," he exposed himself to the objection that he had mistaken his form, and that on his own showing his relief was by an action at common law for money had and received or on the theory of his authority, Duncan *v.* Benson, or else by a bill in equity upon the theory of a violated duty as agent or as trustee.

Point III.

The second exception to the fourth libel is well taken and should have been sustained by the District Court.

This exception was that the libel did not state a cause of action.

Independently of other contentions urged elsewhere in this brief, we submit that there is a patent and fatal defect on the face of this libel.

We understand this Court to have declared that there can be no valid respondentia of cargo without due communication with its owners where such communication is possible.

The *Julia Blake*, 107 U. S., 418.

The libel avers (fol 10):

"The libellants, *not being fully advised of the* "*circumstances*, and believing that the said bond "was properly and necessarily issued, assented."

This is an admission and averment that due and full communication was possible, but was not had, and (since it is conceded that if the libellants were not obligated to pay the bond they can have no cause of action against us) states them out of Court.

In the Court below the learned counsel for the libellant discussed English and other cases in support of a different doctrine as to the necessity of communication, but in our judgment the question is not now open to discussion in this Conrt.

Other cases on bottomry and respondentia are:

The *Casa Marittima*, 2 Ap. C., 156.
The *Buonaparte*, 8 Mo. P. C., 459.
The *Hamburg*, 2 Mo. P. C. N. S., 289.
Cargo ex *Sultan*, 1 Swabey, 504.
The *Gratitudine*, S. C. Rob., 261.
Duncan v. *Benson*, 1 Exch., 557; *S. C.*, 3 Exch., 644.
The *Onward*, 4 Ad. and Ec., 57.
The *Lizzie*, L. R., 2 Ad. and Ec., 254.
The *Karnak*, 2 Ad. and Ec., 299.
The *Panama*, L. R., 3 P. C., 199.
Australasian S. N. Co. v. *Morse*, L. R., 4 P. C., 227.
Smith v. *Bank of N. S. Wales*, 4 P. C., 194.
The *Oriental*, 7 Mo. P. C., 398.
The *Pontida*, 9 P. D., 177.

The libellants' contention that there is a fatal defect in our case upon this point in that there is no issue raised by the pleadings, is untenable. The libel alleged in its fifth article a partial communication with the cargo owners, which allegations are expressly denied by the answer (Article 9, p. 12). Counsel seems to consider this "very indefi-

nite," but it is not seen how a denial *can* be indefinite although a statement or averment may have that vice. The trouble with the libel is that it was drawn upon the theory that we acted wickedly and wrongfully in beginning our voyage with an unseaworthy ship (fol. 8), and did further wrong in the port of distress by electing to carry forward a portion of the original cargo in the *Andrew Johnson* for "own advantage and not for the advantage of the libellants" (fol. 9). The proofs having shown this theory so utterly without foundation, counsel now has trouble in stretching his libel enough to make it appear to cover the theories he now argues. As to the counsel's statement (Brief, p. 38c.) that it has never been disputed that communication with the owner of cargo was in fact made, we refer to the record (fols. 3, 68) and to the respondent's sixth assignment of error (fol. 94).

We have always assumed that the master notified the cargo owners of his arrival in the port of distress, but probably (after the custom of ship masters) of but little of after events unless they applied for such information. This being so, it constituted a complete defense to the bond under the German Code, which the libellants, having knowledge of, were bound to insist on when payment of the bond was demanded of them.

The German Code, Section 504 (Transcript, p. 39), requires the master * * * "to take every pos-
" sible care that those interested in the cargo are
" speedily informed of such occurrences and of the
" measures thereby rendered necessary."

If the libellants, in stating their case to the Hamburg experts or arbitrators, had informed them, as by their fourth and final libel they have informed this Court (fol. 10), that they were not fully advised of the circumstances surrounding the transaction, there can be no doubt that the arbitrators would have held the bond void, in which event there could of course have been no claim against us.

Point IV.

The third exception to the libel is well taken and should have been sustained by the District Court.

The third exception was that the libel did not state any cause of admiralty and maritime jurisdiction.

Upon the libellants' own showing their alleged cause of action arose out of the receipt by the respondent of the *Thirlmere's* dividend from the English High Court of Justice in a statutory proceeding. No reason is perceived why this should give another admiralty court jurisdiction of an action to recover part of such dividend. If the libellants had a cause of action it should have been pursued in a court of equity. That this objection is one of substance and merit and not of mere form, easily appears upon consideration of the history of the case.

Notwithstanding the fact that the libellants and their London solicitors, Waltons, Bubb & Johnson, participated in the distribution of the *Thirlmere's* dividend (Transcript, 50-53) in 1885 and 6, the advocate who verified the libel swore (fol. 81) that the first knowledge he had of said proceedings was in July, 1890 (we accept the counsel's statement implicitly), and the final libel was filed about six years after the loss of the *Andrew Johnson*, the final decree not being entered until upwards of nine years after her loss. The libellants were thus allowed three opportunities and three years' time in which to shift their position in the litigation, while the respondent was denied a single opportunity to amend his answer, although he was a non-resident of this circuit. The record also shows that although the respondent was half insured and had repaid his underwriters half his *Thirlmere* dividend (fol. 39) at the time of the entry of the final decree the

Statute of Limitations had run against his claim, against his underwriters, to be recouped for half the amount of the final decree of the District Court ($9,598.94).

So that had the final decree of the District Court been carried into effect, the respondent, in place of the fine ship worth $60,000, and charter freight of over $20,000, making a total of over $80,000, which he had when the vessel left Caleta Buena, would have netted less than $15,000 (net *Thirlmere* proceeds, $5,000, less decree, $10,000,=$15,000), or an aggregate loss of $65,000, which loss was in fact diminished by the sum of $15,683 net payment by underwriters (fol. 39), leaving the respondent to sustain a net loss of nearly $50,000 by reason of a peril of the sea, against which he had contracted for a partial indemnity when his servant executed the bond carrying a bottomry premium of 17½ per cent.

The record also shows, although the amended libel upon which the libellant recovered said judgment was not filed until October 28, 1890, interest on the recovery was allowed from April 2, 1886, and finally, although the libellants had once already had their day in Court in England on the claim at bar and had been defeated, the respondent was not allowed a single opportunity to amend his answer by setting up such adjudication, although no claim of surprise to the libellants was made or could have been made.

We submit that no court of equity could, consistently with established practice, have treated a defendant so harshly as this respondent was treated by the District Court, even if both Courts should hold that the libellants had a cause of action against him.

Point V.

The respondent should have been allowed to plead "*res adjudicata*."

The many amendments and long delay of the libellants in averring facts within their own knowledge have already been mentioned.

The respondent's application was made before the reading of the depositions, and his rights were saved by due exception (fols. 23, 83).

The usual reasons for denying an amendment of a pleading are, 1st, surprise; 2d, loss of material witnesses. The first objection was not raised at bar; had it been raised it could have been cured by an adjournment of the trial; the second objection could not possibly arise, as the proof, if allowed, would have been documentary evidence of the libellants' proceedings in the London law suit.

Point VI.

The decree of the Circuit Court of Appeals should be affirmed, with costs.

Dated New York, March 18, 1897.

SIDNEY CHUBB,
Advocate for Respondent.

No. 40.

DEC 18 1897
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

EDWARD E. O'BRIEN

against

BRICE ALAN MILLER and others,

Libellants.

No. 40.
October Term,
1897.

Please take notice that the annexed petition will be submitted to the Supreme Court of the United States on Monday, December 20th, 1897, at the opening of Court on that day, and that a motion will thereon be made for a reconsideration and amendment of the decree herein to the end that the mandate of the Court may direct that the cause be remanded to the District Court, with directions to enter a decree in favor of the libellants for one-half of the amount found due by the Commissioner.

Dated New York, December 16th, 1897.

SIDNEY CHUBB,
Advocate for Respondent.

SUPREME COURT OF THE UNITED STATES.

EDWARD E. O'BRIEN,

against

BRICE ALAN MILLER and others,

Libellants.

No. 40.
October Term,
1897,
Respondent's
Petition.

The respondent above named respectfully shows as follows:

The opinion of the Court herein states:

"It is also clearly inferable from the statements "in the affidavit we have referred to that when the "answer to the 3d amended Libel was filed the "proctor for the respondent knew of the transaction "with the Insurance Company."

The respondent herein has since given notice of motion to amend the decree of this Court to be entered on the foregoing opinion so as to allow them simple and compound interest and costs in all courts. That respondent is advised that the affidavit referred to in the foregoing extract from the opinion of this Court was not intended to give rise to the inference drawn by the Court, and that such inference was not correct. He is also advised that his counsel's objections to the allowance of interest by the District Court have not been and could not be argued in this Court, owing to the scope of the decree of the Circuit Court of Appeals, and the manner in which the issues were presented in this Court, and he submits to this Court that it is a hardship that he should be required to pay so large a sum of money as the libellants claim herein, even conceding their claim for a substantial recovery upon the merits as decided by this Court.

Wherefore he prays that this Court will reconsider and amend this decree so as to remand the cause to the District Court with instructions to that

Court so enter a decree for one-half the amount found due by the Commissioner, viz., the sum of $3,045.86.

EDWARD E. O'BRIEN,
By SIDNEY CHUBB,
Advocate.

I certify that I have examined the record of the proceedings in this cause in all courts and believe the above application of the respondent to be well founded and one that should be entertained and granted by this Court.

SIDNEY CHUBB,
Advocate.

SUPREME COURT OF THE UNITED STATES.

EDWARD E. O'BRIEN

against

BRICE ALAN MILLER and others,
Libellants.

No. 40.
October Term
1897.

Southern District of New York, ss.:

Sidney Chubb, being duly sworn, says that he was the proctor for the respondent O'Brien in the above entitled action in the District Court.

That deponent has never seen the said respondent O'Brien and that to the best of deponent's recollection and belief the first knowledge that deponent had of the insurance which the respondent O'Brien had upon the ship "Andrew Johnson" and of the payment thereof by the Insurance Company was obtained by reading a copy of the deposition of the said respondent Edward E. O'Brien as a witness for the LIBELLANTS sent to deponent from Portland, Maine, which deposition is printed at page 36 of the Apostles in the lower Court, and was taken before a U. S. Commissioner, pursuant to notice by the libellants. That deponent was not present at such examination, and the respondent was not cross-examined on his own behalf by any one.

That the following is an extract from said deposition:

"The Insurance Company paid me that sum "($30,000 less the premium note) on January 6th, "1885," so that at the time of the taking of the deposition the Statute of Limitation had already run against the respondent's claim for recoupment. That deponent did not move upon learning of said insurance to amend his answer, for the reason that as the evidence concerning it had already been brought into the case, as part of the libellant's

affirmative case, it was not necessary to move, inasmuch as the Court would take notice of it, and gave it its due legal effect, both according to the course of the District Court when sitting in admiralty and also according to the provisions of §723 of the Code of Civil Procedure of the State of New York, which provides among other things that the Court may upon the trial amend any process, pleading or other proceeding by conforming the pleading or other proceeding to the facts proved.

SIDNEY CHUBB.

Sworn to before me this
17th day of December, 1897.

LOUIS H. MAY,
Notary Public Kings Co.
[L. S.] Cert. filed in N. Y. Co.

SUPREME COURT OF THE UNITED STATES.

EDWARD E. O'BRIEN

against

BRICE ALAN MILLER and others,
Libellants.

No. 40.
October Term,
1897.

Memorandum on behalf of the respondent O'Brien.

It is submitted that the libellants, Miller *et al.*, should not recover interest herein nor recover more than one-half of the sum reported by the Commissioner,

First.—Because the damages were unliquidated and were not ascertained until the coming in of the Commissioner's report, which was in June, 1894. This long delay was occasioned in small part only by the time consumed in taking testimony. The greater part of the delay was caused by the libellants' failure to inform their proctors of a fact that was certainly within their own knowledge, inasmuch as they received a dividend from the "Thirlmere" proceeding, and they ought not therefore to be allowed to recover interest for a delay which they themselves were the cause, least of all in a cause where this delay has caused a loss to the opposite party of valuable rights, which he would have enjoyed but for the delay.

Second.—No proper claim for damages, even assuming that the merits of the case were with the libellants, was ever presented to the respondents before the interlocutory decree. There is ground for arguing that the average adjustment should be made according to the law of Chili, or according to the law of the port of destination, Germany, or ac-

cording to the law of the forum, but there is absolutely no ground for claiming that it should be made up according to the law of England, which is different from that of other nations in this respect and is testified in this case to so differ.

The respondent was required to cross-examine in London as to this adjustment, and upon his objection in the District Court the testimony in support of the adjustment was excluded and the adjustment not allowed in evidence, and the sum afterward found due by the Commissioner was considerably less than the amount named in the libel on the basis of this adjustment.

The libellants' proposition appears to be that, although both parties may have failed to communicate to their respective proctors knowledge of facts which were relevant and material to the issues, nevertheless the libellants should not only not suffer from their own delay, but should recover the interest that accrued during this interval, while the respondent is denied any relief whatever, although his is the more excusable omission, since a layman who was being sued about matters which happened partly in Chili and partly in Europe might not unreasonably suppose that matters transacted in Maine were not relevant to the litigation, and therefore not proper to be communicated to his counsel.

The record shows that a special assignment of error was made by the respondent to the allowance of interest by the District Judge, but as the Circuit Court of Appeals held that there was no liability on the part of the respondent it was not necessary for that Court to discuss the question of interest in their opinion. As it was not discussed in their opinion, the point was not therefore open for argument to the appellee in this Court, and he has therefore been without the benefit of a review of the District Judge's award upon this point.

The modification sought by the libellants will not only allow interest for the whole time, but also, inasmuch as the District Court decree included over

$3,000 interest, it will include interest on this, or compound interest, making an aggregate of over $12,000.

It is submitted, therefore, that the mandate of this Court should read as follows:

"The decree of the Circuit Court of Appeals must "be reversed and the cause remanded to the District "Court with direction to that Court to enter a "decree in favor of the libellants for one-half the "amount reported by the Commissioner," viz.: the sum of $3,045.87.

SIDNEY CHUBB,
Advocate.

No. 40.

FILED
DEC 17 18
JAMES H. McKEN

Supreme Court of the United States.

EDWARD E. O'BRIEN AGAINST BRICE ALAN MILLER and others, *Libellants.*	No. 40. October Term, 1897.

Please take notice that the annexed petition will be submitted to the Supreme Court of the United States on Monday, December 20th, 1897, at the opening of Court on that day, and that a motion will thereon be made for a reconsideration and amendment of the decree herein to the end that payment of interest upon the decree of the District Court of the United States for the Southern District of New York may be specially directed by this Court.

Dated New York, December 10th, 1897.

WILHELMUS MYNDERSE,
Proctor for Libellants.

To SIDNEY CHUBB, ESQ.,
Proctor for Edward E. O'Brien, 7 South William Street,
New York City.

Service of the foregoing notice and of the petition therein referred to is hereby admitted this 10th day of December, 1897.

SIDNEY CHUBB,
Advocate for E. E. O'Brien.

SUPREME COURT OF THE UNITED STATES.

EDWARD E. O'BRIEN AGAINST BRICE ALAN MILLER and others, Libellants.	No. 40. October Term, 1897.

The libellants above named respectfully show as follows:

The libellants, as owners of a cargo of nitrates shipped on the *Andrew Johnson*, filed their libel in the District Court of the United States for the Southern District of New York, on the 20th day of July, 1887, claiming contribution from Edward E. O'Brien, owner of the *Andrew Johnson*, for his share or portion of certain charges and expenses incurred by the master of the *Andrew Johnson* at Callao, a port of distress, and which the libellants had been required to pay under a bottomry and *respondentia* bond given by the said master affecting their cargo.

The respondents caused an adjustment to be stated upon such information as they could control, although naturally they, as owners of cargo, did not have full information respecting the expenses incurred.

Upon such adjustmentment they claimed $7,870.16 (*Record, p. 7*), and filed a libel in admiralty therefor.

The shipowner denied liability *in toto* and made no tender of any amount (*Answer, pp. 12, 13*).

Under the interlocutory decree of the District Court a new adjustment was ordered April 12th, 1894 (*Record, p. 48*), and the report of the adjuster showed that $6,091.73 principal was due from the shipowner as his share or portion of the expenses covered by the bond, and for this amount the District Court gave a decree July 12th, 1894, with interest thereon to the date of the decree (*Decree, pp. 55, 56*).

Upon an appeal by the shipowner to the United States Circuit Court of Appeals the decree of the District Court was ordered reversed May 6th, 1895 (*Record, pp. 67, 68*).

Thereupon the libellants applied to this Court for a writ of *certiorari*, which was granted May 7th, 1895 *(Record, p. 66)*.

This Court has, under date of November 29th, 1897, entered a decree reversing the decree of the United States Court of Appeals, and affirming that of the District Court of the United States for the Southern District of New York with costs, and directing that the cause be remanded to the said District Court accordingly. The decree does not specially direct the payment of interest upon the decree of the District Court, and the petitioners are advised that under the provisions of Rule 23 of this Court, sub-division 4, interest may not be allowed by the District Court in default of such special direction, this cause being an admiralty cause. The mandate has not yet issued.

The petitioners show that it is a hardship that they should be deprived of interest, the amount of their recovery being purely for moneys advanced for account of the shipowner, and in respect of which he has never made any tender.

The libellants therefore pray that this Court will reconsider and amend their decree so as to specially direct the payment of interest upon the decree of the District Court of the United States for the Southern District of New York.

BRICE ALAN MILLER and others,
Libellants.

By WILHELMUS MYNDERSE,
Proctor.

I certify that I have examined the record of proceedings in this cause, and believe the above application of the libellants to be well founded.

WILHELMUS MYNDERSE,
Advocate.

SUPREME COURT OF THE UNITED STATES.

EDWARD E. O'BRIEN

AGAINST

BRICE ALAN MILLER and others,
Libellants.

No. 40.
October Term, 1897.

Memorandum on Behalf of Libellants' Application for Amendment of the Decree.

This is a case in admiralty, wherein the decree of the District Court of the United States for the Southern District of New York has been affirmed with costs by this Court.

The rules of this Court provide as follows in respect of interest upon affirmance of decrees of lower Courts:

"In cases in admiralty damages and interest may be al-
"lowed if specially directed by the Court."

Rule 23, Subdiv. 4, as amended March 10th, 1890, 133 U. S., 711, Appendix.

Although the decree of the Circuit Court of Appeals has been reversed it is apprehended that the cause may be within the operation of Rule 23, inasmuch as the decree of the District Court has been affirmed, and if, in the discretion of this Court the libellants should have interest upon the District Court, decree, it is advisable that special directions be given therefor.

Decrees in admiralty are not infrequently for unliquidated amounts, as in salvage cases, detention cases, possessory actions and actions for personal injury, and for this reason it is presumed that the rules of this Court make distinct provision in respect of interest in admiralty causes.

In the case at bar, however, the recovery of the libellants is mere reimbursement for moneys advanced by libellants through their forced payment of the bottomry and respondentia bond, the amount being determined with exactness by

an adjuster. The shipowner has throughout denied all liability and has made no tender of any amount.

The situation was such that the District Court allowed interest upon the amount of the shipowner's assessed contribution to the date of its decree *(Decree, p. 55)*.

The execution of that decree was interrupted by an appeal taken by the shipowner to the United States Court of Appeals. The litigation has been long and costly to the libellants. They became involved in the matter as owners of cargo, without any direct action upon their part, and without any volition in the incurring of the original expenses.

We submit that under such circumstances they should be allowed at least such compensation as interest will give them.

WILHELMUS MYNDERSE,
Advocate.